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International Convention for the Protection of All Persons from Enforced Disappearance

Report of the Secretary-General

Summary

In its resolution 64/167 on the International Convention for the Protection of All Persons from Enforced Disappearance, the General Assembly called upon States that had not yet done so to consider signing and ratifying or acceding to the Convention as a matter of priority and to consider the option provided for in articles 31 and 32 of the Convention regarding the Committee on Enforced Disappearances. It requested the Secretary-General and the United Nations High Commissioner for Human Rights to continue with their intensive efforts to assist States to become parties to the Convention, with a view to achieving universal adherence. It also requested the United Nations agencies and organizations, and invited intergovernmental and non-governmental organizations and the Working Group on Enforced or Involuntary Disappearances, to continue undertaking efforts to disseminate information on the Convention, promote understanding of it, prepare for its entry into force and assist States parties in implementing their obligations under that instrument. Also in resolution 64/167, the Assembly requested the Secretary-General to submit to it, at its sixty-fifth session, a report on the status of the Convention and the implementation of the resolution. The present report is submitted in accordance with that request.

* A/65/150.

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In a note verbale dated 11 May 2010, the Secretariat invited Governments to transmit any information pertaining to the implementation of resolution 64/167. Replies have been received from the Governments of Argentina, Colombia, Cuba, Finland, Georgia, Guatemala, Japan, Mexico, Paraguay, Slovakia and Switzerland. Their responses are summarized in the present report.

The present report also includes information on the activities of the Secretary-General, the United Nations High Commissioner for Human Rights, the Working Group on Enforced or Involuntary Disappearances, United Nations agencies and organizations, and intergovernmental and non-governmental organizations in relation to the dissemination and promotion of the International Convention for the Protection of All Persons from Enforced Disappearance.

Contents

		Page
I.	Introduction	3
II.	Adoption and status of ratifications of the International Convention for the Protection of All Persons from Enforced Disappearance	3
III.	Replies received from Governments	4
	Argentina	4
	Colombia	5
	Cuba	6
	Finland	6
	Georgia	7
	Guatemala	8
	Japan	9
	Mexico	9
	Paraguay	11
	Slovakia	12
	Switzerland	12
IV.	Activities of the Secretary-General and the Office of the United Nations High Commissioner for Human Rights	13
V.	Activities of the Working Group on Enforced or Involuntary Disappearances	14
VI.	Activities of United Nations agencies and organizations and intergovernmental and non-governmental organizations	16

I. Introduction

1. In its resolution 64/167, entitled "International Convention for the Protection of All Persons from Enforced Disappearance", the General Assembly underlined its concern about the increase in enforced or involuntary disappearances in various regions of the world, including arrest, detention and abduction, when these are part of or amount to enforced disappearances, and by the growing number of reports concerning harassment, ill-treatment and intimidation of witnesses of disappearances or relatives of persons who have disappeared.

2. In the resolution, the General Assembly welcomed the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance and the fact that 81 States had signed the Convention and 18 had ratified or acceded to it. The Assembly called upon States that had not yet done so to consider signing and ratifying or acceding to the Convention as a matter of priority, as well as to consider the option provided for in articles 31 and 32 of the Convention regarding the Committee on Enforced Disappearances, with a view to its entry into force by December 2009.

3. In the same resolution, the General Assembly requested the Secretary-General and the United Nations High Commissioner for Human Rights to continue their intensive efforts to assist States to become parties to the Convention, with a view to achieving universal adherence.

4. The General Assembly also requested United Nations agencies and organizations, and invited intergovernmental and non-governmental organizations and the Working Group on Enforced or Involuntary Disappearances to continue undertaking efforts to disseminate information on the Convention, promote understanding of it, prepare for its entry into force and assist States parties in implementing their obligations under that instrument.

5. The General Assembly welcomed the report of the Secretary-General (A/64/171) and called for him to submit, at its sixty-fifth session, a report on the status of the Convention and the implementation of the resolution.

6. On 11 May 2010, the Secretariat invited States to transmit relevant information pertaining to the implementation of the resolution. Replies were received from the Governments of Argentina, Colombia, Cuba, Finland, Georgia, Guatemala, Japan, Mexico, Paraguay, Slovakia and Switzerland. Their responses are summarized in the present report. The full text of the submissions are available from the Secretariat.

II. Adoption and status of ratifications of the International Convention for the Protection of All Persons from Enforced Disappearance

7. On 29 June 2006, in its resolution 1/1, the Human Rights Council adopted the International Convention for the Protection of All Persons from Enforced Disappearance, as annexed to the resolution and recommended that the General Assembly adopt the Convention.

8. By its resolution 61/177, the General Assembly adopted and opened for signature, ratification and accession the International Convention for the Protection

of All Persons from Enforced Disappearance. The Convention will enter into force after the deposit of the twentieth instrument of ratification or accession (art. 39, para. 1). As at 4 August 2010, 83 States have signed and 19 have ratified or acceded to the Convention; six States have also recognized the competence of the Committee on Enforced Disappearances to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation by the State party of provisions of the Convention (art. 31); and seven States have recognized the competence of the Committee to receive and consider communications in which a State party claims that another State party is not fulfilling its obligations under the Convention (art. 32).

III. Replies received from Governments

9. The following section provides summaries of replies by States to the invitation of the Secretariat to transmit relevant information pertaining to the implementation of General Assembly resolution 64/167.

Argentina

[Original: Spanish]
[6 July 2010]

Argentina played a highly active role both in the drafting of the text of the Convention and in its subsequent negotiation. Evidence of that fact is that once the inaugural session of the Human Rights Council began, in 2006, the Argentine and French delegations led a group of countries committed to promoting the draft convention, the adoption of which came to be a priority objective of the new body in the area of progressive development of international human rights law.

Hence the two countries, conscious that the adoption of the Convention represented a major step forward in the fight against impunity and in favour of the prevention of enforced disappearance, acted jointly to ensure that the instrument was adopted by the Council by consensus.

Argentina was the first country to sign — and the second to ratify — the International Convention for the Protection of All Persons from Enforced Disappearance, and it has recognized the competence of the Committee on Enforced Disappearances provided for in articles 31 and 32 of the Convention. It should be noted that the Senate is currently debating a bill which would give precedence to the Convention over domestic law.

When ratifying the Convention, in February 2007, Argentina undertook to lead a campaign to promote it with a view to ensuring that it came into force swiftly. This was because Argentina considered that the Convention was not simply another instrument but also a major step forward in the fight to counter impunity and to promote and protect human rights.

Thus, in addition to the information contained in report A/64/171, it is important to note that within the context of the General Assembly, Argentina elaborated and negotiated resolution 64/167 and that in September 2009, the Argentine Minister for Foreign Affairs delivered notes to his peers from all the

countries of the United Nations that had not yet signed or ratified the Convention, in an effort both to convey to them the importance of the instrument with regard to the progressive development of international human rights law and to request them to consider the possibility of signing and/or ratifying it, depending on the case.

Within the framework of the activities and measures of cooperation and joint effort carried out by the State together with non-governmental organizations, Argentina, through the Ministry of Health and the National Memory Archive — National Human Rights Secretariat — signed an agreement with the Argentine Forensic Anthropology Team for implementing, and supporting Argentina in, the Latin American Initiative for the Identification of the "Disappeared".

The initiative, in its regional and local phase, is intended to increase significantly the identification of the remains of persons "disappeared" for political reasons in Latin America.

It should also be pointed out that Argentina has drafted resolutions on the right to the truth that have been adopted by consensus both within the regional system for the protection of human rights (Organization of American States) and within the universal system (United Nations General Assembly, Commission on Human Rights, Human Rights Committee). This is important in connection with the subject under consideration, in view of the fact that the right to the truth and the right of all persons not to be victims of enforced disappearance are intimately related.

Colombia

[Original: Spanish]
[14 June 2010]

Colombia signed the International Convention for the Protection of All Persons from Enforced Disappearance on 27 September 2007, after an extensive interdepartmental review involving various Colombian State entities.

Subsequently, on 26 November 2009, the Ministry of Foreign Affairs, together with the Ministry of Defence, submitted to Congress a bill to approve the Convention in order to follow the procedure for its ratification.

This bill is currently under debate in the Second Committee of the Senate of the Republic, which is responsible, inter alia, for international policy issues and international treaties. The Committee has already held the first of the total of four debates required for the bill's approval, after which it will be discussed in a plenary meeting of the Senate.

The national Government has made and is continuing to make every possible effort to support the bill so that it is approved as soon as possible, while expecting it to be approved by a plenary Senate meeting prior to 20 June 2010, the closing date of the current legislative session, in which case discussion of the bill could be completed in the following session, which begins on 20 July 2010. As soon as the Convention is approved in Congress, the Constitutional Court will consider it, following the procedure established in article 241, paragraph 10, of our Political Constitution. The enabling legislation and the Convention will be referred to the Constitutional Court by the Government within six days of the adoption of the law. While the Court studies the constitutionality of the Convention and its enabling

legislation, any citizen may offer their opinion to defend or challenge it. If the Court's review is favourable, the Government will be able to deposit the respective instrument of ratification.

The Colombian State and Government are committed to the prevention and investigation of any case of enforced disappearance. They have therefore made significant efforts to combat that scourge and seek to reinforce the prevention and investigation efforts by ratifying this important Convention.

Cuba

[Original: Spanish]
[5 July 2010]

Cuba played an active role in the negotiations which led to the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance. Cuba was one of the countries that signed it at the ceremony in Paris on 6 February 2007. On 2 February 2009, it proceeded to ratify this important legal instrument.

The General Assembly's adoption of the International Convention for the Protection of All Persons from Enforced Disappearance marked was a sign of significant progress in international efforts to prevent that practice in the world. It is particularly significant for all the organizations of family members of disappeared persons and other non-governmental organizations which have struggled and continued to make efforts for so many years to prevent such crimes from being forgiven or forgotten and to prevent impunity from prevailing.

The Government of the Republic of Cuba attaches special importance to strengthening international efforts to combat enforced or involuntary disappearances. All aspects of this subject should be taken into account when addressing it through actions and measures to prevent these horrendous crimes from being committed in any part of the world.

The Republic of Cuba's legal system governs and protects the rights of the individual. In accordance with that system, Cuban legislation establishes not only the universally recognized basic legal guarantees for the protection of human rights, but offers substantive guarantees for the real and effective exercise of all human rights, both civil and political, and economic, social and cultural.

Finland

[Original: English]
[27 May 2010]

In Finland, the ratification of the Convention for the Protection of All Persons from Enforced Disappearance is under preparation. The timetable for ratification of the Convention is to be confirmed.

Georgia

[Original: English]
[26 July 2010]

The Government of Georgia aims to eradicate enforced disappearances and ensure that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, are invoked as a justification for enforced disappearance. In this connection, Georgia has acceded to a number of multilateral treaties. The international treaties and agreements concluded by Georgia, where they do not contradict the Constitution of Georgia, take precedence over domestic normative acts.

The Constitution of Georgia, adopted on 24 August 1995, covers basic principles of universally recognized human rights and freedoms. Under the Constitution, cases of restriction of liberty are strictly regulated and consolidated under judicial control.

Notwithstanding the fact that there is no direct indication on the prohibition of enforced disappearances in Georgian legislation, certain provisions of the Criminal Code of Georgia criminalize specific activities related to the noted offence. In particular, the Criminal Code deals with the arrest, detention, abduction or any other form of deprivation of liberty by State agents; persons or groups of persons acting with State authorization, support or acquiescence, followed by a refusal to acknowledge the deprivation of liberty; or concealment of the fate or whereabouts of the disappeared person, thereby leaving such person outside the protection of the law.

Domestic law ensures that all persons, irrespective of quality or rank, are held accountable for offences committed or ordered to be committed. Criminal legislation does not envisage any privilege based on the public or official status of an offender.

Moreover, domestic law and regulations ensure that persons deprived of their liberty are not held in secret or prevented from informing their relatives of their arrest and place of detention. Pursuant to international standards, persons deprived of their liberty are to be held in officially recognized places of detention.

Persons deprived of their liberty are also entitled to be visited by close relatives, a defence lawyer and consular and other diplomatic representatives (for foreign citizens); to have telephone conversations and receive and send correspondence by mail, including parcels and letters; and to leave their place of detention for a short time. Through these means of communication, persons deprived of their liberty have an opportunity to maintain close links with their family members and relatives and inform them of their whereabouts and health condition.

Guatemala

[Original: Spanish]
[1 July 2010]

The State of Guatemala signed the International Convention for the Protection of All Persons from Enforced Disappearance on 6 February 2007. Subsequently, on 12 December 2007, the plenary Congress of the Republic took up bill No. 3736, which had been submitted by the executive branch in order to approve the Convention. The decision of the Foreign Affairs Committee on this bill is currently pending.

Subsequently, a few deputies to the Congress of the Republic submitted bill No. 3590, which approves the establishment of the Commission for the Location of Victims of Enforced Disappearance and Other Kinds of Disappearance. This initiative was considered by the plenary Congress of the Republic on 18 January 2007 and transferred to the Legislation and Constitutional Issues Committee and the Public Finance and Currency Committee, for their consideration and report. A report is currently pending.

Civil society organizations are also making various efforts to locate disappeared persons. One example is the work of the Guatemalan Forensic Anthropology Foundation, which has done pioneering work in carrying out exhumations in order to identify persons who disappeared during the internal armed conflict.

In 1999, the Guatemalan Commission for the Application of International Humanitarian Law was established. It is made up of representatives of entities or units of the three branches of State as well as other autonomous public agencies. Recently, in 2009, the Commission set up a working group with a view to examining, implementing and following up on the recommendations on disappeared persons made to the Government of Guatemala by the International Committee of the Red Cross. This working group, which consists of representatives of the Ministries of Foreign Affairs, the Interior and Defence, the Presidential Commission for Coordinating Executive Policy on Human Rights, the Secretariat for Peace and the Guatemalan Red Cross, have been working on the following five initiatives: inclusion in the Civil Code of the concept of absence and presumed death by enforced disappearance and the relevant procedure; establishment of a national information service to collect and convey information about the situation of persons in the event of armed conflict or internal disturbances; inclusion in the Code of Criminal Procedure of a regulation making it compulsory for the authorities to notify family members of a person's detention or arrest; criminalization of the systematic and deliberate prevention of communication of a detained person with family members; and criminalization of the obstruction of identification of human remains.

Similar work is carried out by the National Reparations Programme, which by the end of May 2010 had submitted to the Public Ministry 9,196 reports of cases of persons who were victims of human rights violations during the internal armed conflict, most of the cases relating to enforced disappearances. This demonstrates the Government's interest in establishing penalties for the intellectual and material authors of such human rights violations.

Japan

[Original: English]
[10 June 2010]

Japan notes that it signed the International Convention for the Protection of All Persons from Enforced Disappearance at a signing ceremony in Paris on 6 February 2007, depositing with the Secretary-General of the United Nations the instrument of ratification of the Convention on 23 July 2009. Japan believes that the significance of the Convention is to confirm enforced disappearance as a punishable offence internationally, and to deter offences of this nature from being repeated in the future. Ratification of this Convention is meaningful in the context of increasing international concern over the issue of enforced disappearance, including abduction. Japan has been urging other States to sign and ratify the Convention.

In July 2009, the "Law for partial amendment to the Immigration Control and Refugee Recognition Act and the Special Act on the Immigration Control of, inter alia, those who have Lost Japanese Nationality Pursuant to the Treaty of Peace with Japan" was promulgated. Accordingly, it was clearly prohibited to expel, return or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or enforced disappearance, as provided in article 16, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance and in the Convention against Torture.

The Government of Japan has posted a Japanese translation of the Convention and news regarding its ratification on a website and included it in the Diplomatic Bluebook of the Ministry of Foreign Affairs to inform the public of its existence and significance.

Mexico

[Original: Spanish]
[19 July 2010]

The Convention was signed by Mexico on 6 February 2007 and the instrument of ratification was deposited on 18 March 2008.

With a view to disseminating the contents of the Convention among the various public administration units and federal entities and in order to prepare for its entry into force, information on General Assembly resolution 61/177, through which the Convention was adopted, was distributed to the offices of government procurators, inter alia, as they are responsible for investigating and prosecuting the crime of enforced disappearance of persons.

In addition, dissemination activities on that subject have been carried out by the Ministry of the Interior. The Mexican State has also adopted various measures in order to achieve the goal of the Convention.

Accordingly, the 2008-2012 National Human Rights Programme refers, in the action lines of goal 4, to promoting, in the federal public administration and the legislative branch, the enactment of a law on the enforced disappearance of persons that is consistent with the United Nations International Convention for the Protection

of All Persons from Enforced Disappearance, which has been signed and ratified by Mexico.

There is also an interdisciplinary committee on reparations for the damage to victims and others affected by human rights violations committed by individuals linked to past social and political movements. The Committee, whose members are from various offices of the federal public administration, is analysing a number of proposals for establishing the form, procedures and terms of reference for making reparations for damage in the 275 cases of enforced disappearance which were confirmed by the National Human Rights Commission in its recommendation 26/2001.

On 12 March 2010, the interdisciplinary group for preventing the enforced disappearance of persons was established in line with the international commitments assumed by Mexico through the international treaties it had ratified on that subject. The interdisciplinary group is the result of all the efforts made to contribute to the measures taken in that area. The interdisciplinary group consists of representatives of the three levels of government and its objective is to establish a coordination mechanism to prevent and eradicate the enforced disappearance of persons by instituting measures and administrative mechanisms and providing training for public officials. It is currently developing the work programme for 2010-2012.

In connection with the specific reference made in the above-mentioned International Convention to the State's obligation to investigate enforced disappearances, the Mexican State has made various reforms to its legal system.

The Mexican State has a technical-legal unit in the Ministry of Public Security which specializes in addressing and investigating complaints and reports of alleged human rights violations which may have been committed by the Ministry's public officials and its local administrative units in order to penalize those responsible as appropriate. The above-mentioned unit is responsible for documenting and making the necessary arrangements in order to establish the facts; it also assists the internal control entities, the Federal Public Ministry and, when appropriate, the legal system, to clarify the relevant administrative, civil and/or criminal responsibilities.

In line with the above, and with a view to preventing human rights violations by members of the Federal Police, there has been a strengthening of training and promotional activities for a culture of human rights, so that officials receive training in international and national human rights standards and humanitarian law on their entry into service and then on a permanent and continuous basis. The National Human Rights Commission has a programme for dealing with complaints involving reports of disappeared persons, a programme implemented by the First Inspectorate General.

The purpose of the programme is to investigate all reports of disappeared persons in which it is presumed or claimed that a State official was involved in the detention of those persons and denied them the protection of the law by concealing or denying knowledge of their location.

To that end, a programme of work is being implemented with a view to, on the one hand, finding the location of such persons, and on the other hand, gathering the evidence needed to establish the historical truth of the events, in order to issue the appropriate decision as required by law.

Paraguay

[Original: Spanish]
[25 June 2010]

The International Convention for the Protection of All Persons from Enforced Disappearance was signed by the Republic of Paraguay on 7 February 2007, and was promulgated by Act No. 3977 of 25 May 2010. The Paraguayan State also ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which is a valid legal instrument for preventing the application of any temporary or permanent measure that could lead to de facto impunity in cases subject to statutory limitations such as those involving enforced disappearance of persons.

It has been reported that the Directorate-General for Truth, Justice and Reparation of the Office of the Ombudsman, in an effort to ensure the continuity of the work of the Truth and Justice Commission, is contributing to the broader dissemination of the Commission's Final Report and is seeking effective implementation of the conclusions and recommendations formulated by the Commission. One of its main tasks to search for and to locate persons who were victims of enforced disappearance or extrajudicial execution and to conduct the historical and legal investigation.

Since July 2009 to date, the Directorate-General, in conjunction with the Human Rights Directorate of the Ministry of the Interior, the Forensic Science Department of the National Police, and the Public Ministry's human rights prosecutors have been continuing the efforts to find disappeared detained persons from the period 1954-1989. Blood samples of family members are taken for identification and reparations purposes at various locations throughout the country.

The Directorate-General decided to reactivate an agreement with the Argentine Forensic Anthropology Team of the Argentine Republic so that the two entities could coordinate and consult on methodological and archaeological aspects of the excavations, anthropological laboratory tests and the taking of possible bone samples for due identification by DNA extraction, which is thus a continuation of the work that they had begun together during the time of the Truth and Justice Commission.

During the mandate of the Commission, a series of complaints had been made to the Public Ministry relating to cases of enforced disappearance.

The Directorate-General plays an active role in the Standing Committee on Memory, Truth and Justice, which was created during meetings of the relevant senior human rights authorities of MERCOSUR member countries.

The Directorate-General is now implementing all the resolutions of the Standing Committee on Memory, Truth and Justice, which was previously a working group that decided to promote the use of forensic genetics in accordance with international standards accepted by the scientific community in order to contribute to identification of the remains of victims of grave human rights violations. It was also decided to promote the use of forensic genetics to identify persons who had been separated from their families.

The Standing Committee on Memory, Truth and Justice also decided to extend its coordination of positions in order to advocate, within the Human Rights Council, for a new international non-binding instrument on the right to truth. Progress is being made in systematizing the contents and scope of that right and in developing good practices to ensure effective compliance.

The Public Prosecutor's Office of Paraguay has advocated for the investigation of all acts punishable as crimes against humanity or violating human rights. In that connection, with regard to all of the persons prosecuted so far, some are still being investigated, others have been sentenced to terms of imprisonment and others have passed away.

Slovakia

[Original: English]
[20 July 2010]

Slovakia declared its willingness to become a party to the International Convention on the Protection of All Persons from Enforced Disappearance in September 2007, upon signing the Convention. Slovakia is willing to undertake its obligations under the Convention, including the key provisions on international cooperation, prevention and adoption of protective measures after a disappearance occurred. In 2008, Slovakia informed the International Coalition against Enforced Disappearances that it stands ready to recognize the competence of the future Committee on Enforced Disappearances, including its specific competence to consider communications from individuals.

Under article 4 of the Convention, each State party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law. Following the signature of the Convention in 2007, the Ministry of Justice conducted a legal analysis and drafted the amendment to the Penal Code of Slovakia defining the offence of "enforced disappearance". The amendment has not yet been approved by the National Council of the Slovak Republic.

Switzerland

[Original: French]
[24 June 2010]

The Swiss Federal Council reaffirms its support for the Convention, which it considers to be an essential effort for protecting the persons concerned and for strengthening international human rights law. In accordance with domestic procedure and in view of the fact that the cantonal authorities would be directly affected if the Convention were ratified, the cantons were consulted between September and December 2009. The process for signing is currently under way.

IV. Activities of the Secretary-General and the Office of the United Nations High Commissioner for Human Rights

10. Since the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance, on a number of occasions the Secretary-General has called upon States to ratify this instrument (see A/63/299, A/63/337 and A/64/186). On 26 June 2010, in his message on the occasion of the International Day in Support of Victims of Torture, the Secretary-General, noting that only two more ratifications were needed for the International Convention for the Protection of All Persons from Enforced Disappearance to enter into force, stated that the Convention would reinforce the international legal framework to combat and prevent this heinous practice. He urged those States which had not ratified the Convention to do so as soon as possible.

11. A number of reports and publications issued by the Secretary-General make reference to the Convention and/or specific articles thereof (see, for example, the 2010 report of the Secretary-General to the Human Rights Council on human rights in the administration of justice, including juvenile justice (A/HRC/14/34), and the 2010 guidance note of the Secretary-General on the United Nations approach to transitional justice).

12. The International Convention for the Protection of All Persons from Enforced Disappearance was highlighted during the treaty-related events organized by the United Nations in New York in 2007, 2008 and 2009, to bolster international law and promote treaty implementation. It is among the multilateral treaties to be highlighted during the 2010 treaty event.

13. In her 2009 "Report on activities and results", the United Nations High Commissioner for Human Rights noted that as a result of the support provided by the Human Rights Adviser of the Office of the United Nations High Commissioner for Human Rights (OHCHR), Ecuador ratified the Convention in October 2009.

14. As described in the strategic management plan for the biennium 2010-2011, one of the six thematic strategies pursued by the United Nations High Commissioner for Human Rights is the strengthening of human rights mechanisms and the progressive development of international human rights law. To advance in this direction, during this period, OHCHR will continue to support the preparation of new instruments and protocols and the establishment of new treaty bodies, including the Committee on Enforced Disappearances. The strategic management plan refers to the status of ratifications of the Convention as at 30 November 2009. It mentions that among the expected accomplishments and strategies, the regional offices for South America and South-East Asia expect to achieve a greater number of countries in their respective regions ratifying, inter alia, the International Convention for the Protection of All Persons from Enforced Disappearance. To achieve this goal, planned activities include seminars, workshops, discussion panels and regional meetings. Similarly, one of the thematic priorities for the OHCHR country office in Nepal includes the ratification of the International Convention for the Protection of All Persons from Enforced Disappearance through sustained advocacy, awareness-raising activities and the provision of technical advice.

15. In her 2010 report to the Human Rights Council on the follow-up to the World Conference on Human Rights (A/HRC/13/26), the United Nations High Commissioner for Human Rights noted that the creation of a treaty body established

by the International Convention for the Protection of All Persons from Enforced Disappearance was imminent.

16. In addition, in the most recent annual report on the activities of her office in Guatemala (A/HRC/13/26/Add.1), the United Nations High Commissioner for Human Rights urged the Congress and the Government of Guatemala to ratify, inter alia, the International Convention for the Protection of All Persons from Enforced Disappearance. In her report on the situation of human rights in Colombia, submitted to the Human Rights Council in 2010 (A/HRC/13/72), through her country office in Colombia, the United Nations High Commissioner for Human Rights welcomed the initial steps taken by the Senate of Colombia towards the prompt and comprehensive ratification of the International Convention for the Protection of All Persons from Enforced Disappearance. She also pointed out that the ratification of the Convention would require aligning national legislation to international standards.

17. On 9 March 2010, during the thirteenth session of the Human Rights Council, the United Nations High Commissioner for Human Rights opened the Panel Discussion on the Right to the Truth, citing the relevant provision of the International Convention for the Protection of All Persons from Enforced Disappearance dealing with the right to know the truth.

18. In addition, in her 2010 report on the right to the truth and on forensic genetics and human rights (A/HRC/15/26), the United Nations High Commissioner for Human Rights highlighted a number of relevant provisions of the Convention.

19. In 2009, OHCHR launched a publication entitled *Amnesties*[1] as part of its *Rule-of-Law Tools for Post-Conflict States* series. This publication, in its chapter on international law and United Nations policy on amnesties, devotes a section to enforced disappearances, in which several articles of the Convention for the Protection of All Persons from Enforced Disappearance are described.

20. The third revision of fact sheet No. 6 on enforced or involuntary disappearances, prepared by OHCHR, contains a section devoted to the International Convention for the Protection of All Persons from Enforced Disappearance and another to exploring the future relationship between the proposed Committee on Enforced Disappearances and the Working Group on Enforced or Involuntary Disappearances.

21. Updated information on the status of ratification of the Convention can be found on the United Nations and OHCHR websites.

V. Activities of the Working Group on Enforced or Involuntary Disappearances

22. Established by the Commission on Human Rights in its resolution 20 (XXXVI) and renewed by the Human Rights Council in its resolution 7/12, the Working Group on Enforced or Involuntary Disappearances was the first United Nations human rights thematic mechanism established with a global mandate. Since its inception, the Working Group has transmitted more than 53,000 individual cases

[1] United Nations publication, Sales No. E.09.XIV.1.

to Governments in more than 90 States. The number of cases under active consideration that have not yet been clarified, closed or discontinued stands at 42,600 and concerns 82 States. The Working Group has been able to clarify 1,776 cases over the past five years.

23. The Working Group uses every opportunity to promote the ratification of the Convention, including during visits undertaken to different States and bilateral meetings held with its representatives.

24. On 28 August 2009, on the occasion of the International Day of the Disappeared, and on 26 February 2010, on the occasion of its thirtieth anniversary, the Working Group issued public statements in which it called upon all Governments that had not signed and/or ratified the Convention to do so as soon as possible so that the Convention could enter into force. It also called upon States that had not signed or ratified the Convention to do so and, when ratifying the Convention, to accept the competence of the Committee on Enforced Disappearances to receive and consider individual and inter-State communications under articles 31 and 32 of the Convention. The Working Group further affirmed, in its 2009 annual report to the Human Rights Council (A/HRC/13/31), that the entry into force of the Convention would strengthen Governments' capacities to reduce the number of disappearances and bolster the hopes and the demands for justice and truth by victims and their families.

25. In the joint study on global practices in relation to secret detention in the context of countering terrorism, undertaken jointly by the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and the Working Group on Arbitrary Detention (A/HRC/13/42), the mandate holders recommended States to ratify the Convention.

26. On 8 March 2010, the Chair-Rapporteur of the Working Group presented the Group's 2009 annual report to the Human Rights Council and, on its behalf, invited all States to ratify the Convention and to accept the competence of its Committee under articles 31 and 32. The Working Group expressed its hope that the Convention would enter into force in 2010 as it would complement and strengthen the work of the Working Group and others to combat the heinous crime of enforced disappearance.

27. As part of a series of events and activities being undertaken in 2010 to commemorate its thirtieth anniversary, the Working Group held, on 18 March 2010, a side event entitled "Thirty years between hope and despair: the experience of the Working Group on Enforced or Involuntary Disappearances". A panel session during this event was devoted to the possible collaboration between the Working Group and the Committee to be established after the entry into force of the Convention. In a press statement following the event, the Working Group welcomed the calls made to ratify the Convention.

28. On 21 June 2010, at the end of its mission to Bosnia and Herzegovina, the Working Group acknowledged that Bosnia and Herzegovina had signed the International Convention for the Protection of All Persons from Enforced Disappearance and stated that it looked forward to Bosnia and Herzegovina ratifying

it and recognizing the competence of the Committee on Enforced Disappearances pursuant to articles 31 and 32 of the Convention.

29. On 25 June 2010, at the conclusion of its ninety-first session, the Working Group called on all States that had not ratified the Convention to do so and accept the State and individual complaint procedures.

VI. Activities of United Nations agencies and organizations and intergovernmental and non-governmental organizations

30. A number of United Nations agencies and organizations and intergovernmental and non-governmental organizations have made concerted efforts at the national, regional and universal levels to disseminate information on the Convention, promote understanding of it, prepare for its entry into force and assist States parties in implementing their obligations under this instrument. Examples of these efforts include those summarized below.

31. The United Nations High Commissioner for Refugees (UNHCR) has referred to the Convention in a number of publications and reports (for example, the 2010 Handbook for the Protection of Internally Displaced Persons and the report of the United Nations High Commissioner for Refugees (A/62/12 (Supp.)). The full text of the Convention is accessible from the online Refworld database and it has been published in the Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR (vol. I).

32. The United Nations Educational, Scientific and Cultural Organization regularly provides information through publications, including those on its website, on the status of ratifications of international human rights instruments, including the Convention.

33. Since the adoption of the Convention, the General Assembly of the Organization of American States has passed several resolutions which include a call to Member States to sign and/or ratify the Convention (for example, AG/RES.2575 (XL-O/10), AG/RES.2594 (XL-O/10) and AG/RES.2595 (XL-O/10)).

34. Since the adoption of the Convention, the European Union has encouraged its signature and/or ratification on several occasions, through bilateral human rights dialogues, démarches and public statements. For instance, on 8 December 2008, in its conclusions on the sixtieth anniversary of the adoption of the Universal Declaration of Human Rights, the Council of the European Union invited all States which had not done so to plan to sign and ratify the Convention. In addition, the European Union has promoted the implementation of the Convention, both bilaterally and within the Human Rights Council. In relation to the Council of Europe, the Commissioner for Human Rights has invited a number of States to sign and/or ratify the Convention (for example CommDH(2010)20, CommDH(2009)8 and CommDH(2008)25). By its resolution 1623 (2008), the Parliamentary Assembly of the Council of Europe recommended member States of the Council of Europe and States whose Parliaments enjoy observer status with the Parliamentary Assembly to ratify, if they had not done so, and fully implement, inter alia, the Convention. In addition, on 16 January 2008, at the 1015th meeting of the Ministers' Deputies, the Committee of Ministers of the Council of Europe adopted its reply to Parliamentary Assembly Recommendation 1801 (2007), in which it recalled the Convention and

affirmed that its entry into force would significantly contribute to combating the practice of enforced disappearances.

35. Regarding civil society, Amnesty International is actively campaigning for ratification and effective implementation of the Convention. To mark the International Day of the Disappeared on 30 August 2009, Amnesty International's campaigning — including through its national sections and worldwide membership — targeted as a priority 10 countries with the aim of securing the ratifications required for the entry into force of the Convention. In this connection, a web page and a web action targeting those 10 countries went live on its website on 28 August 2009; several documents were prepared to mark this day, including two campaign digests calling for ratification of the Convention in Africa and Europe; and Amnesty International's members in several countries wrote letters to the authorities of the target countries urging for ratification. In addition, as part of its ongoing country-related work, Amnesty International regularly calls on States to ratify the Convention and — for the Convention to be effective — to introduce legislation to implement it. The organization also often cites articles of the Convention in its documents.

36. Human Rights Watch has issued several press releases, reports and statements, and has also sent several letters calling on States to adhere to the Convention and/or referring to the provisions of this international instrument.

37. The International Commission on Missing Persons has organized and participated in several promotion and advocacy activities related to the Convention.

38. The International Coalition against Enforced Disappearances, which comprises several non-governmental organizations, has engaged in a number of activities to promote the Convention through its focal point. These include sending letters to Heads of State in 2007, ministers for foreign affairs in 2008 and national parliaments in 2009; coordinating national campaigns in more than 20 countries; and maintaining the Coalition's website.

39. The "Linking Solidarity" team of Aim for Human Rights has organized, inter alia, training sessions, seminars and conferences on the Convention. It has also issued a primer on the Convention in English, French and Spanish. These activities are aimed at promoting the Convention and making it accessible for civil society organizations working in this area.

40. The non-governmental organizations TRIAL (Track Impunity Always), the Asian Federation against Involuntary Disappearances, Odhikar, the Lebanese Centre for Human Rights, the Human Rights Commission of Pakistan and the Working Group on Justice for Peace have also undertaken a number of activities to disseminate information on the Convention and/or promote its ratification.

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Item 69 (b) of the provisional agenda*
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Promotion and protection of human rights and fundamental freedoms while countering terrorism

Note by the Secretary-General

The Secretary-General has the honour to transmit to members of the General Assembly the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, submitted in accordance with General Assembly resolution 64/168 and Human Rights Council resolution 13/26.

* A/65/150.

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Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Summary

The present sixth and final report submitted to the General Assembly by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism addresses (in section II), the question of compliance with human rights by the United Nations when countering terrorism. After a brief account of the activities of the Special Rapporteur between November 2009 and July 2010 (section I), the report takes stock of and assesses the role and contributions of, inter alia, the Assembly, the Counter-Terrorism Implementation Task Force, the Human Rights Council, the Security Council and its subsidiary bodies, and United Nations field presences in the promotion and protection of human rights in the context of their counter-terrorism activities.

The main recommendation contained in the report is that the Security Council should seize the opportunity of the approaching tenth anniversary of its resolution 1373 (2001) to replace resolutions 1373 (2001), 1624 (2005) and 1267 (1999) (as amended) with a single resolution, not adopted under Chapter VII of the Charter of the United Nations, in order to systematize the States' counter-terrorism measures and reporting duties of States under one framework. This proposal is motivated by the assessment of the Special Rapporteur that Chapter VII does not provide the proper legal basis for maintaining the current framework of mandatory and permanent Security Council resolutions of a quasi-legislative or quasi-judicial nature.

The report also addresses ways and means of improving the human rights accountability of the United Nations for its field operations, including in the context of countering terrorism, as well as the contributions of various actors in the implementation of the 2006 United Nations Global Counter-Terrorism Strategy (General Assembly resolution 60/288).

Contents

		Page
I.	Introduction	4
II.	Activities of the Special Rapporteur	4
III.	Compliance by the United Nations with international human rights law while countering terrorism	6
	A. General Assembly	6
	1. The United Nations Global Counter-Terrorism Strategy	7
	2. Other resolutions	8
	3. Counter-Terrorism Implementation Task Force	9
	4. Human Rights Council	10
	B. Security Council	11
	1. The regime pursuant to resolution 1373 (2001) and the Counter-Terrorism Committee	11
	2. The sanctions regime pursuant to resolution 1267 (1999)	16
	C. Field presences	19
	1. Framing the issue	19
	2. Selected substantive issues	20
IV.	Conclusions and recommendations	21
	A. Conclusions	21
	B. Recommendations	22

I. Introduction

1. The present report is the sixth and final report to the General Assembly by the current Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, submitted pursuant to General Assembly resolution 64/168 and Human Rights Council resolution 13/26. The focus of the report is the promotion and protection of human rights and fundamental freedoms in the counter-terrorism activities of the United Nations.[1]

2. Regarding planned country visits, the Special Rapporteur has been invited to undertake a mission to Peru in September 2010 and would like to thank the Government in that regard. In addition, the Government of Iceland has invited the Special Rapporteur for consultations during the same month.

3. There are outstanding visit requests for Algeria, Chile, Malaysia, Pakistan, the Philippines, the Russian Federation and Thailand as well as a follow-up visit request to Egypt.

II. Activities of the Special Rapporteur

4. From 22 to 26 January 2010, the Special Rapporteur conducted a visit to Tunisia, at the invitation of the Government. The Special Rapporteur had discussions with the Ministers for Foreign Affairs and for Justice and Human Rights, with Ministry of Interior officials, judges, parliamentarians, the High Committee on Human Rights and Fundamental Liberties, representatives of the international community, lawyers, academics and non-governmental organizations, including human rights organizations and organizations of victims of terrorism, regarding the anti-terrorism law and practice of the country. He visited the Bouchoucha police detention facility and the Mornaguia prison, where he interviewed several persons suspected of or convicted for terrorist crimes. The Special Rapporteur will present his report on the visit to the Human Rights Council.

5. On 8 February 2010, the Special Rapporteur met with the Ambassador of Tunisia and representatives of the Permanent Missions of Mexico and Peru to the United Nations. The Special Rapporteur also held a meeting with the President of the Human Rights Council.

6. On 22 and 23 February 2010, the Special Rapporteur was represented at a Counter-Terrorism Implementation Task Force workshop on countering terrorist use of the Internet, held in Richmond/Bellevue, Washington, United States of America.

7. On 1 and 2 March 2010, an expert workshop was held on good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight, with the support of the Office of the United Nations High Commissioner for Human Rights (OHCHR) and in conjunction with the Geneva Centre for the Democratic Control of Armed Forces.

[1] The Special Rapporteur is grateful to Lisa Ginsborg, consultant, and Nikolas Kyriakou, both PhD researchers at the European University Institute, and to the Office of the United Nations High Commissioner for Human Rights for their assistance in preparing the report.

8. On 8 March 2010, the Special Rapporteur presented his annual report, focusing thematically on the right to privacy (A/HRC/13/37), the report containing communications to and from Governments (A/HRC/13/37/Add.1) and the report on the mission to Egypt (A/HRC/13/37/Add.2) to the Human Rights Council at its thirteenth session.

9. On 30 and 31 March 2010, the Special Rapporteur met with the Ambassadors of Mexico and Thailand, and with representatives of the Permanent Mission of the Russian Federation to the United Nations.

10. On 31 March 2010, a questionnaire requesting information on good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight, was sent to all Member States. On 15 April 2010, the Special Rapporteur held a public consultation on such good practices with Member States, of which 49 attended.

11. On 1 June 2010, the Special Rapporteur presented to the Human Rights Council the report on good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight (A/HRC/14/46 and Add.1).

12. On 2 and 3 June 2010, the Special Rapporteur, jointly with the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and the Vice-Chair of the Working Group on Arbitrary Detention, presented the joint study on global practices in relation to secret detention in the context of countering terrorism (A/HRC/13/42) to the Human Rights Council at its fourteenth session.

13. During that period, the Special Rapporteur met with the Ambassadors of Egypt and Tunisia, the Deputy-Ambassador of the Philippines and the Ambassador and Representative of the United States of America to the Human Rights Council.

14. With a view to the preparation of the sixth and final report of the Special Rapporteur to the Human Rights Council, on 21 June 2010, the Office of the United Nations High Commissioner for Human Rights sent a questionnaire to all Member States on best practices on legal and institutional frameworks and measures that ensure respect for human rights while countering terrorism. The identification and dissemination of such practices will be the main theme of the forthcoming report of the Special Rapporteur to the Council.

15. From 28 June to 2 July 2010, the Special Rapporteur attended the seventeenth annual meeting of special procedures of the Human Rights Council, held in Geneva.

16. On 29 and 30 July 2010, the Special Rapporteur participated in a stakeholder retreat on the United Nations counter-terrorism programme, convened by the Center on Global Counterterrorism Cooperation at Greentree Estate, Manhasset, New York, United States.

III. Compliance by the United Nations with international human rights law while countering terrorism

17. In order to respond to the pressing problems posed by terrorism, the functions of the United Nations have evolved in a manner that was not anticipated at its inception. This brings to the fore the human rights responsibility of the United Nations as an international organization and the possibility of their violation in the discharge of its duties.[2] Although the United Nations is not formally a party to any international human rights instrument, there are several arguments that support the applicability of human rights to it, including: (a) the United Nations is a subject of international law and therefore bound by customary international law; (b) the United Nations, by means of its constitutional mandate, particularly Articles 1 (3), 24 (2) and 55 (c) of the Charter, is obliged to abide by human rights;[3] (c) the United Nations is bound by extension of the responsibility of its members; and (d) human rights obligations exist on account of the adoption of the Universal Declaration on Human Rights, treated by many as an authoritative interpretation of human rights obligations under the Charter. It has been correctly asserted that it would be odd indeed to hold that the organization from which the international protection of human rights originated and which still looks at their protection as one of its fundamental goals, be exempted from the obligation to respect them.[4] As the actual problem may rather be in the absence of adequate procedures for holding the United Nations to account than in the absence of substantive legal obligations, the creation of a World Court of Human Rights with jurisdiction over the United Nations and its organs has been proposed as a solution.[5]

A. General Assembly

18. The General Assembly has played a pioneering role in the global struggle against international terrorism, as well as in drawing attention to the human rights implications of terrorism and of counter-terrorism measures. In recent years, in the framework of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 and the working group of the Sixth Committee, the Assembly has continued its work in the field of codifying international law on terrorism. The increasing attention by the Assembly to the promotion and protection of human rights while countering terrorism is reflected in a number of resolutions adopted on the subject, including the United Nations Global Counter-Terrorism Strategy.

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[2] See A/64/10, text of the draft articles on responsibility of international organizations.

[3] Frédéric Mégret and Florian Hoffman, "The United Nations as a human rights violator? Some reflections on the United Nations changing human rights responsibilities", *Human Rights Quarterly*, vol. 25, No. 2 (May 2003), p. 317; and René Cassin, "La déclaration universelle et la mise en oeuvre des droits de l'homme" in *Recueil des cours* (1951-II) Académie de droit international, vol. 79.

[4] Andrea Bianchi, "Security Council's anti-terror resolutions and their implementation by Member States", *Journal of International Criminal Justice*, vol. 4, issue 5 (2006), p. 1062.

[5] See the Swiss Initiative research project on A world human rights court, in particular draft statutes in Martin Scheinin "Towards a world court of human rights", and Manfred Nowak and Julia Kozma "A world court of human rights", both available from: http://www.udhr60.ch/research.html.

1. The United Nations Global Counter-Terrorism Strategy

19. The United Nations Global Counter-Terrorism Strategy was adopted by the General Assembly in its resolution 60/288 as the first comprehensive, collective and internationally approved framework for tackling the problem of terrorism worldwide. The defence of human rights and upholding the rule of law while countering terrorism featured prominently in the report of the Secretary-General on recommendations for a global counter-terrorism strategy (A/60/825), and the plan of action of the Strategy recognizes that any measure taken to prevent and combat terrorism must comply with international law, including the Charter of the United Nations, and in particular human rights law, refugee law and humanitarian law (see General Assembly resolution 60/288, annex, para. 3).

20. Measures to ensure respect for human rights for all and the rule of law forms one of the four pillars of the Strategy and at the same time a component in all other pillars (ibid., sect. IV). The title of the fourth pillar identifies this principle as the fundamental basis of the fight against terrorism. The Strategy recognizes that it is necessary to address the long-term structural conditions conducive to the spread of terrorism, which include: prolonged unresolved conflicts, dehumanization of victims of terrorism in all its forms and manifestations, lack of rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization, and lack of good governance (ibid., sect. I). The Strategy calls for action to combat these conditions while it makes clear that none of the conditions can excuse or justify terrorism.

21. The Strategy represents a clear affirmation by Member States that effective counter-terrorism measures and the protection of human rights are not conflicting, but complementary and mutually reinforcing goals and that human rights and the rule of law are the fundamental basis of their counter-terrorism strategies. While the main responsibility for implementing the Strategy falls on Member States, the Strategy calls on the United Nations system to provide support and reaffirms the important role of the United Nations system in strengthening the international legal architecture by promoting the rule of law, respect for human rights and effective criminal justice systems (ibid., sect. IV.5). Furthermore, in reaffirming the Strategy in 2008, the General Assembly called upon United Nations agencies involved in supporting counter-terrorism efforts to continue to facilitate the promotion and protection of human rights and fundamental freedoms while countering terrorism (General Assembly resolution 62/272, para. 7).

22. The Special Rapporteur is concerned that the centrality of the respect for human rights and the rule of law as the fundamental basis of the fight against terrorism set out in the Strategy is often not translated into counter-terrorist practice within the United Nations system and at the national level. In its focus on prevention and conditions conducive to terrorism, the Strategy offers the possibility to stimulate a more comprehensive international response to terrorism, which should not be limited to traditional counter-terrorism actors, and includes United Nations agencies that traditionally have not worked in the area of counter-terrorism, as well as United Nations country teams.[6]

[6] Eric Rosand, From adoption to action: the United Nations' role in implementing its Global Counter-Terrorism Strategy, Center on Global Counterterrorism Cooperation policy brief (April 2009).

2. Other resolutions

23. The General Assembly has adopted over 60 resolutions on international terrorism. In 1993, the Assembly adopted its first resolution on the subject of human rights and terrorism (General Assembly resolution 48/122), in which it underlined that the right to life was the most essential and basic human right. In 1995, for the first time, it affirmed that all measures to counter-terrorism should be in strict conformity with international human rights standards (General Assembly resolution 50/186). Since 2003, the Assembly has adopted annual resolutions on the protection of human rights and fundamental freedoms while countering terrorism, which have increasingly dealt with specific human rights questions that might arise while countering terrorism.[7] After the establishment of the mandate of the Special Rapporteur, these resolutions have often made reference to his reports and taken up some of his recommendations.

24. While reminding States to ensure that measures taken to combat terrorism comply with their obligations under international law, in particular international human rights, refugee and humanitarian law, and emphasizing the prescribed limits to any derogations from human rights (see General Assembly resolution 57/219), the General Assembly has turned its attention to a number of specific human rights standards that must be respected by States in their counter-terrorism measures. These include:[8]

- Legality in criminalization of terrorism — States must ensure that laws criminalizing acts of terrorism are accessible, formulated with precision, non-discriminatory and non-retroactive (see resolution 63/185, para. 18).
- Non-discrimination — counter-terrorism measures should be implemented in full consideration of minority rights and must not be discriminatory on the grounds of race, colour, sex, language, religion or social origin (see resolution 61/171, para. 5); States should not resort to profiling based on discriminatory stereotypes (see resolution 63/185).
- Due process guarantees — States must ensure due process guarantees, consistent with all relevant provisions of international law (ibid., para. 12), to respect the right of persons to equality before the law, courts and tribunals and to a fair trial (see resolution 64/168, para. 6 (e)) and to ensure that any person whose human rights or fundamental freedoms have been violated has access to an effective remedy and that victims receive adequate reparations (ibid., para. 6 (n)).
- Deprivation of liberty and prohibition of torture — States must respect the liberty, security and dignity of the person, treat all prisoners in all places of detention in accordance with international law (see resolution 61/171, para. 8) and fully comply with their obligations with regard to the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment (see resolution 63/185, para. 8).
- Non-refoulement obligations of States — States must ensure that border control and pre-entry mechanisms fully respect their obligations towards

[7] Bibi van Ginkel, *The Practice of the United Nations in Combating Terrorism from 1946 to 2008: Questions of Legality and Legitimacy*.

[8] References in paragraph 24 are to General Assembly resolutions.

persons seeking international protection (see resolution 62/159, para. 8); States must refrain from returning persons, including in cases related to terrorism, to their countries of origin or to a third State whenever such transfer would be contrary to their obligations under international law (ibid., para. 7).

- Economic, social and cultural rights — States should protect all human rights, including economic, social and cultural rights, bearing in mind that certain counter-terrorism measures may have an impact on the enjoyment of those rights (see resolution 64/168, para. 6 (f)).

25. The issue of a draft comprehensive convention on international terrorism was referred in 2001 to the Ad Hoc Committee and continues to be pursued by States, including after the call by the General Assembly in the 2005 World Summit Outcome (resolution 60/1) for the adoption of the convention by the General Assembly during its sixtieth session.[9] The Special Rapporteur has warned that calls by the international community for action to eliminate terrorism, in the absence of a universal and comprehensive definition of the term, can give rise to adverse consequences for human rights (see E/CN.4/2006/98). The strong emphasis on counter-terrorism throughout the United Nations system risks giving unintended international legitimization for conduct undertaken by oppressive regimes, through delivering the message that the international community wants strong action against "terrorism", however defined.

3. Counter-Terrorism Implementation Task Force

26. The Counter-Terrorism Implementation Task Force was established by the Secretary-General in July 2005. It works to ensure coordination and coherence among United Nations entities involved in counter-terrorism efforts and aims to catalyse and mobilize the counter-terrorism efforts of various United Nations system entities to assist Member States in implementing the United Nations Global Counter-Terrorism Strategy. The Special Rapporteur has provided input and has participated in a number of Task Force working groups, which are tasked with implementation of the strategy, in particular the working group on supporting and highlighting victims of terrorism, the working group on countering the use of the Internet for terrorist purposes and the working group on protecting human rights while countering terrorism.

27. In the context of supporting victims of terrorism, the Special Rapporteur has emphasized the importance of providing material, legal and psychological assistance to victims of terrorism, who have suffered serious violations of their basic rights (see A/HRC/10/3/Add.2, paras. 44-46), and the importance of bringing the perpetrators of terrorist acts to justice (see E/CN.4/2006/98, para. 66).

28. While recognizing the importance of coordinating efforts to counter-terrorism on the Internet, and with reference to the report of the respective Task Force working group,[10] the Special Rapporteur reminds States that it is imperative that any measures aimed at policing and reducing terrorism-related activities or content on the Internet be carried out with full respect for human rights, and that any

[9] See in particular the report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 at its fourteenth session, A/65/37.

[10] See the report of the working group, February 2009. Available from: http://www.un.org/terrorism/pdfs/wg6-internet_rev1.pdf.

restriction be prescribed by law, in pursuit of a legitimate purpose, and respect the principles of necessity and proportionality.[11]

29. The working group on protecting human rights while countering terrorism has started to deliver practical tools to assist Member States in strengthening the protection of human rights in the context of counter-terrorism in selected specific areas.[12] The Special Rapporteur encourages Member States and other actors to make use of these and other available tools such as the OHCHR fact sheet on human rights, terrorism and counter-terrorism,[13] the Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism,[14] and existing thematic reports by the Special Rapporteur.[15]

30. The Special Rapporteur considers it essential that human rights issues be mainstreamed throughout the Task Force, in line with the United Nations Global Strategy, and that each working group incorporate a human rights component and perspective.[16] The current structure of the Task Force may otherwise run the risk of reinforcing the existing stovepiped approach to the protection of human rights standards in the counter-terrorist action of the United Nations system.[17] While the establishment of the mechanism of Integrated Assistance for Countering Terrorism[18] is a promising step to coordinate technical assistance by different United Nations actors, full integration of human rights issues requires continued effort.

4. Human Rights Council

31. In 2004, a one-year mandate of an Independent Expert was established to explore the human rights dimension of counter-terrorism measures (see Commission on Human Rights resolution 2004/87), and on the basis of his recommendations (see E/CN.4/2005/103), the Commission on Human Rights in 2005 established the mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.[19]

32. The United Nations High Commissioner also continues to report to the Human Rights Council on issues related to human rights and counter-terrorism.[20] The degree of coordination between the respective reports by the Special Rapporteur and the United Nations High Commissioner has varied over the years. The annual resolutions of the Human Rights Council have referred to both reports. Following

[11] Ibid., para. 84. See also Council of Europe recommendation CM/Rec(2008)6 on measures to promote the respect for freedom of expression and information with regard to Internet filters (adopted by the Committee of Ministers on 26 March 2008).

[12] See outcome note from workshop on the development of practical tools, September 2008. Available from: http://www.un.org/terrorism/pdfs/Web-Developing%20Practical%20Tools.pdf.

[13] See Fact Sheet No. 32, "Human rights, terrorism and counter-terrorism". Available from: http://www.ohchr.org/EN/PUBLICATIONSRESOURCES/Pages/FactSheets.aspx.

[14] Available from: http://www.ohchr.org/Documents/Publications/DigestJurisprudenceen.pdf.

[15] Available from: http://www2.ohchr.org/english/issues/terrorism/rapporteur/reports.htm.

[16] Eric Rosand, Alistair Millar and Jason Ipe, "Human rights and the implementation of the United Nations Global Counter-Terrorism Strategy: hopes and challenges" (Center on Global Counterterrorism Cooperation, 2008), p. 21.

[17] Ibid., p. 3.

[18] See http://www.un.org/terrorism/i-act.shtml.

[19] See Commission on Human Rights resolution 2005/80, subsequently renewed and modified in Human Rights Council resolution 6/28.

[20] See, for example, A/HRC/13/36, A/HRC/12/22, A/HRC/8/13, A/HRC/4/88.

the good practices of human rights treaty bodies, the Council has, in the context of its universal periodic review of States' human rights compliance, systematically recommended measures for States to ensure human rights compliance in countering terrorism.

B. Security Council

1. The regime pursuant to resolution 1373 (2001) and the Counter-Terrorism Committee

33. The Counter-Terrorism Committee was established pursuant to Security Council resolution 1373 (2001), in the immediate aftermath of the terrorist attacks of 11 September 2001. Acting under Chapter VII of the Charter, the Security Council identified a number of Member State obligations in countering terrorism and established the Counter-Terrorism Committee for the purpose of monitoring, including by considering State reports, the implementation of the resolution.

34. Pursuant to resolution 1373 (2001), the Security Council for the first time imposed on all States Members of the United Nations a number of general, permanent obligations, not connected to a specific conflict situation. In effect, this type of action amounts to the Council establishing new binding rules of international law. The obligations laid out in resolution 1373 (2001) contain no end in time or geography and apply to any act of terrorism worldwide. As a result, it has been contested whether it was the prerogative of the Council to take this type of de facto legislative measure.[21]

35. As an organ of an international organization, the Security Council is bound by its constituent instrument, the Charter. The Charter, in particular its Chapter VII, provides the foundation for and limit to action by the Security Council. Moreover, Article 24 (2) demands that the Council act in accordance with the purposes and principles of the United Nations (which include, in Article 1 (3), the promotion of and respect for human rights) when discharging its duties.

36. Article 39 of the Charter regulates the determination by the Security Council of the existence of a threat to peace, breach of peace, or act of aggression. On the basis of this determination, the Council may decide what measures may be taken to maintain or restore international peace and security, including measures not involving the use of armed force, under Article 41 of the Charter. While the Council is granted a great deal of discretion to determine what amounts to a threat to peace, this determination must always be linked to a specific concrete situation as opposed to an abstract problem or hypothetical future situation.[22] Moreover, measures taken by the Council under Chapter VII should be taken on a case-by-case basis according to the principle of proportionality. The Council should use its exceptional powers

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[21] Bjorn Elberling, "The ultra vires character of legislative action by the Security Council", in *International Organizations Law Review*, vol. 2(2).

[22] See Matthew Happold, "Security Council resolution 1373 (2001) and the constitution of the United Nations", in *Leiden Journal of International Law*, vol. 16 (2003); Valeria Santori, "The United Nations Security Council's (broad) interpretation of the notion of the threat to peace in counter-terrorism", in *International Cooperation in Counter-Terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Giuseppe Nesi, ed. (Hampshire, United Kingdom, Ashgate Publishing Limited, 2006).

solely to take measures deemed indispensable to countering a specific concrete situation that is posing a threat to international peace and security.

37. The inherent limits to the powers of the Security Council under Chapter VII are more pressing in the light of the persistent problem of the lack of a universal, comprehensive and precise definition of "terrorism" (see E/CN.4/2006/98). The Special Rapporteur considers it problematic for binding permanent measures to be imposed by the Council on all Member States on the basis of hypothetical future acts falling under such a controversial and internationally undefined notion as terrorism.

38. The question of whether the Security Council, when adopting resolution 1373 (2001), acted within the powers assigned to it by the Charter is also tied to the notion of separation of powers between the different United Nations bodies, in particular between the Security Council and the General Assembly.[23] The Security Council has the primary responsibility for the maintenance of international peace and security in specific situations. It lacks the competence to encourage the progressive development of international law and its codification since this task is explicitly assigned to the Assembly in the Charter (Article 13 (1)). Since 2001, there has been rapid progress in State ratifications of the International Convention for the Suppression of the Financing of Terrorism, resulting in a proper legal basis for States' obligations in this field even without a Chapter VII resolution by the Security Council.[24] Further, the composition and procedures of the Security Council are ill-suited to the imposition of permanent general obligations on all Member States.[25]

39. For the reasons above, the Special Rapporteur considers that whatever justification the Security Council may have had in September 2001 for the adoption of resolution 1373 (2001), its continued application nine years later cannot be seen as a proper response to a specific threat to international peace and security. The implementation of resolution 1373 (2001) goes beyond the powers conferred on the Council and continues to pose risks to the protection of a number of international human rights standards.

40. As noted in the first report of the Special Rapporteur considered by the Human Rights Council in 2006 (see E/CN.4/2006/98, para. 52), resolution 1373 (2001) makes only one passing reference to human rights, in a very specific context. However, in its resolution 1624 (2005), the Security Council explicitly confers a human rights mandate upon the Counter-Terrorism Committee in the implementation of the resolution. Resolutions 1456 (2003) and 1535 (2004) prescribe that States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law.

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[23] See Martti Koskenniemi, "The police in the Temple: order, justice and the United Nations: a dialectical view", in *European Journal of International Law*, vol. 6 (1995).

[24] By September 2001, only four States had ratified the Convention, which was yet to enter into force. Today, there are 173 States parties to the treaty.

[25] A similar conclusion is reached in the report entitled "The United Nations and the new threats: rethinking security", which summarizes the results of the High-level Panel on Threats, Challenges and Change held in Rome in May 2004 and organized by the United Nations Foundation.

41. Since then, the formulation of this so-called human rights clause has evolved. Both Security Council resolution 1822 (2008) and General Assembly resolution 62/272 also refer to action by the United Nations itself, indirectly also that recognizing United Nations action to counter terrorism must fully comply with international law, including human rights law, refugee law and international humanitarian law.

42. The Special Rapporteur has welcomed the 2006 conclusions for policy guidance regarding human rights and the Counter-Terrorism Committee (S/AC.40/2006/PG.2), which guide the Counter-Terrorism Committee Executive Directorate to include international human rights standards in its daily work. He notes with appreciation that the Committee is now committed to include human rights elements in its assessment of Member State compliance with resolution 1373 (2001) and in its technical assistance to Member States. This represents an important shift from the initial stages of work of the Committee.

43. The Special Rapporteur remains alert to the fact that this commitment needs to be translated into the practice of the Committee. In his first report considered by the Human Rights Council in 2006 (see E/CN.4/2006/98, paras. 57-62), the Special Rapporteur presented the findings of a study of roughly 640 reports submitted by Member States pursuant to resolution 1373 (2001), in the period from the establishment of the Committee until November 2005, to assess the human rights implications of the questions and comments to Member States by the Committee. The Special Rapporteur has now conducted a similar study on the approximately 100 reports submitted by Member States pursuant to resolution 1373 (2001) in the period from November 2005 to May 2010. From an examination of the Committee's comments and questions, as reproduced in subsequent reports by the States concerned, the Special Rapporteur found patterns similar to those in his previous study. Again, there were a few instances in which the Committee had been explicitly promoting responses that took due account of human rights standards.[26]

44. On the other hand, while the Committee never appeared to have posed questions that were openly in opposition with international human rights standards, there were many instances in which the questions posed seemed to promote counter-terrorism measures which, in the absence of necessary safeguards, could interfere with the enjoyment of specific human rights. The Committee may thereby appear to be insensitive to a number of potentially affected rights and risks giving States the impression that turning a blind eye to international human rights standards is acceptable in this context. While the situation may, in fact, be better under confidential country-specific work, including country visits, what is publicly available from the consideration of State reports leaves room for improvement in a number of key areas, such as guarantees of due process that should accompany the freezing of the funds suspected of being linked to terrorism;[27] the right to seek asylum and to non-refoulement obligations, with often too broad an approach being taken by the Committee and States on the issue of exclusion, suggesting that

[26] For instance, see the question posed by the Committee in the report submitted by Canada (S/2006/185, enclosure, section 1.5).

[27] See, for example, the report submitted by Brunei Darussalam (S/2007/302, enclosure, section 1.3).

national security or public order are sufficient grounds to exclude a refugee;[28] and the right to privacy.[29] Another right potentially at risk is freedom of association, with the Committee asking questions about States monitoring the activities of charitable organizations and non-governmental organizations, without mention of international freedom of expression and freedom of association standards.[30] The Committee may risk providing oppressive States with further pretexts to crack down on human rights defenders. Finally, there is no public record of the interest on the part of the Committee in curtailing politically inspired over-inclusive national definitions of terrorism that pose a threat both to human rights and to the efficiency of proper counter-terrorism measures.

45. The Special Rapporteur has also examined the State reports submitted pursuant to resolution 1624 (2005). The Committee transmitted to all Member States a series of standard questions (see S/2006/737, para. 2), which included a question in connection with what States were doing to ensure that their measures to implement resolution 1624 (2005) complied with their obligations under international law, in particular international human rights law, refugee law, and humanitarian law. While this practice sends States a message concerning the importance of upholding international law in their counter-terrorism efforts, it does not provide real guidance on the specific human rights standards involved. While a number of States provided details of the specific human rights provisions upheld in their implementation of resolution 1624 (2005) (ibid., section VII), often States answered the question by simply providing a list of the human rights treaties they had ratified,[31] provided some form of generic statement,[32] or did not answer the question at all.[33]

46. The two reports released by the Committee on the implementation of resolution 1624 (2005) (S/2006/737 and S/2008/29) provide a detailed account of the trends in the measures States have taken to implement the resolution, including how States have responded to the standard question on compliance with international law. However, this account of State practice avoids taking a position on the measures' conformity with international law, or highlighting the human rights shortcomings connected to the implementation of resolution 1624 (2005). For instance, the Special Rapporteur notes with concern that in its first report on the implementation of the resolution, the Committee reported that a number of States

[28] See, for example, the reports submitted by Samoa (S/2006/152, enclosure, para. 3 (a), and Myanmar (S/2006/902), enclosure, section 1.13). For an account of the challenges to refugee law and asylum caused by global measures to counter terrorism, see the 2007 report of the Special Rapporteur (A/62/263).

[29] See E/CN.4/2006/98, para. 60. See also the reports submitted by Colombia (S/2006/423, enclosure, section 1.7), Singapore (S/2006/120, enclosure, section 1.8), India (S/2007/196, enclosure, section 1.8) and Seychelles (S/2006/545, enclosure, section 1.11). For an account of the privacy issues involved, see the 2009 report of the Special Rapporteur (A/HRC/13/37, para. 30).

[30] See, for example, the reports submitted by Libya (S/2006/471, enclosure, section 1.11) and Palau (S/2005/823, enclosure, section 1.5).

[31] See, for example, the report submitted by Seychelles (S/2006/545, enclosure, section 2.6).

[32] See, for example, the reports submitted by Bahrain (S/2007/772, enclosure, section 2.6) and China (S/2006/470, enclosure, para. 2.6).

[33] See, for example, the report submitted by the Republic of Korea (S/2006/445, enclosure, section 2.6). In its second report to the Security Council on the implementation of resolution 1624 (2005), the Committee found that approximately half of the States reporting since 7 September 2006 had provided information on how they sought to ensure compliance with paragraph 4 of the resolution (S/2008/29, para. 28).

had criminalized the "glorification" or "apology" of terrorism, without mentioning the human rights concerns that go hand-in-hand with this trend.[34] The Special Rapporteur is concerned that as a result the Committee may be perceived as uncritically receiving reports and thereby accepting the application of measures which may undermine international human rights standards.

47. Notwithstanding the problems with its reporting regime, the Committee has moved away from a focus on collecting, reviewing and requesting reports by States, to different methods of work as the primary tools for assessing implementation by countries of resolution 1373 (2001), such as country visits[35] and the development of preliminary implementation assessments — country-specific analyses provided by the Counter-Terrorism Committee Executive Directorate on the implementation of resolution 1373 (2001).[36] The updated working methods encourage greater focus on implementation by States as the basis of a tailor-made dialogue and less on reporting as such (see S/2006/989, section III). While these changes in the working methods of the Committee constitute a positive shift in moving from assessing the "paper truth" to the "ground truth" regarding implementation of the resolution,[37] the non-public nature of the preliminary implementation assessments and the findings from country visits make the task of assessing the human rights conformity of Committee action difficult.

48. The United Nations High Commissioner for Human Rights has, since 2002, regularly briefed the Committee and raised many important human rights issues, including diplomatic assurances, renditions, individual sanctions and their reform initiatives. In addition, the Special Rapporteur appreciates having had the opportunity to brief the Counter-Terrorism Committee and the Counter-Terrorism Committee Executive Directorate. The Committee has held a number of debates on issues related to human rights.

49. The Special Rapporteur welcomes the inclusion of a section on human rights in the annual global surveys on the implementation of resolution 1373 (2001) compiled on the basis of the preliminary implementation assessments, and the priority recommendations related to human rights for future action by the Counter-Terrorism Committee (see S/2008/379, para. 166, and S/2009/620, para. 130). In order for the human rights commitments of States to be translated into practice, the human rights message conveyed by the Committee and the Counter-Terrorism Committee Executive Directorate to States in their assessments of the implementation of resolution 1373 (2001) needs to be specific to each area of implementation.

50. The Special Rapporteur identifies as a best practice in this regard the 2009 technical guide to the implementation of Security Council resolution 1373 (2001),

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[34] See S/2006/737, section II. As expressed by the Special Rapporteur in his report (E/CN.4/2006/98, para. 56 (c)), a sound response to this trend in respect of human rights standards can be found in the Council of Europe Convention on the Prevention of Terrorism which, in its article 5, includes a definition of "public provocation" of terrorism, based on a double requirement of a subjective intent to incite (encourage) the commission of terrorist offences and an objective danger that one or more such offences would be committed.

[35] See framework document for Counter-Terrorism Committee visits to States (8 February 2005).

[36] See updated working methods of the Committee (17 October 2006).

[37] See Eric Rosand, "Security Council resolution 1373 (2001), the Counter-Terrorism Committee, and the fight against terrorism", in *The American Journal of International Law*, vol. 97, No. 2 (April 2003).

which contains specific human rights guidelines in relation to the specific provisions of the resolution, and can serve to guide States towards implementing the resolution in conformity with international human rights standards.

2. The sanctions regime pursuant to resolution 1267 (1999)

51. The mandate of the Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities is to oversee the implementation of sanctions imposed on Taliban-controlled Afghanistan for its support and harbour of Usama bin Laden. The sanctions regime has been modified by subsequent resolutions,[38] all adopted under Chapter VII of the Charter so that the sanctions measures now apply to designated individuals and entities associated with Al-Qaida, Usama bin Laden and/or the Taliban, wherever located, and result in a consolidated list of individuals and entities to whom the sanctions are to be applied.

52. As in the case of the regime pursuant to resolution 1373 (2001), it can be contested whether the sanctions regime pursuant to resolution 1267 (1999) is compatible with the powers of the Security Council under Chapter VII. In particular, such concerns relate to Security Council resolution 1390 (2002), which was adopted to modify resolution 1267 (1999) sanctions regime following the defeat of the Taliban rule in Afghanistan. This constitutes the first example of an open-ended resolution on sanctions, adopted under Chapter VII without any link to a specific territory or State. While resolution 1267 (1999) could be seen as a temporary emergency measure by the Security Council, using its Chapter VII powers to address a specific threat to peace and security, the regime is no longer limited in time or space. Meanwhile, the rapid progress in State ratifications of the International Convention for the Suppression of the Financing of Terrorism provides a proper legal basis for States' obligations in this field. Further, the actual effectiveness of the listing created pursuant to resolution 1267 (1999) in targeting appropriate persons for sanctions is far from proven. In its current form, the sanctions regime of the Security Council has been said to have judicial or quasi-judicial character.[39] In cases of doubt, legal determinations by the Security Council should always be limited to a particular situation and should be interpreted as being of a preliminary rather than a final character.[40] Such powers are difficult to reconcile with the legal order of the Charter,[41] and the provisions of its article 41.[42]

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[38] Including Security Council resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008) and 1904 (2009).

[39] See E. de Wet, *The Chapter VII Powers on the United Nations Security Council* (Portland, Hart Publishing, 2004), pp. 352-354.

[40] See F. Frowein and N. Krisch, "Introduction to Chapter VII" in *The Charter of the United Nations: a Commentary*, B. Simms, ed. (Oxford, Oxford University Press, 2002).

[41] Article 92 of the Charter clearly identifies the International Court of Justice as the principal judicial organ of the United Nations. In relation to the Security Council, see Keith Harper, "Does the United Nations Security Council have the competence to act as court and legislature?", in *Journal of International Law and Politics*, vol. 27, No. 1. Mr. Harper asks: "Should such a political institution, conferred with executive powers, answer purely juridical questions [...] when there are appropriate fora for the adjudication of such issues?".

[42] Although article 41 is phrased in permissive terms, it does not envisage the Council making legal determinations.

53. Targeted sanctions under the regime have come under frequent criticism by legal scholars and in the reports commissioned by international organizations,[43] and they have been challenged in legal proceedings.[44] Most concerns have been raised about procedural fairness and the absence of effective means for an individual to challenge a listing decision once made.[45] The 2005 World Summit Outcome called upon the Security Council, with the support of the Secretary-General, to ensure that fair and clear procedures existed for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions (see General Assembly resolution 60/1, para. 109). On 29 June 2010, the Security Council held a debate on the promotion and strengthening of the rule of law in the maintenance of international peace and security and addressed also the efficiency and credibility of sanctions regimes (see S/PRST/2010/11).

54. The Special Rapporteur has expressed concern that the listing practice created pursuant to resolution 1267 (1999) has had a serious impact on due process-related rights for individuals suspected of terrorism, as well as their families (see A/63/223, para. 16, and A/HRC/17/6/Add.2, paras. 33-36). In his 2008 report to the General Assembly, he argued that because of the indefinite freezing of the assets of those listed, the listing amounted to a criminal charge owing to the severity of the sanction (A/63/223, para. 16). In 2006, the Special Rapporteur highlighted a number of basic principles and safeguards to be respected and applied in order to bring the listing procedures in line with generally accepted human rights standards (ibid.). The Special Rapporteur further noted that the listing was often the result of political decisions taken by the diplomatic representatives of States within political bodies, based on classified evidence not necessarily evenly shared between the deciding States.

55. The regime has been subject to a number of reforms by the Security Council, including incremental improvements in respect of the status of affected individuals, such as the notification of listed individuals (see Security Council resolution 1735 (2006), paras. 10 and 11), the dissemination of statements and narrative summaries of reasons for listing (see Security Council resolution 1822 (2008), para. 12) and the mandatory review of all entries on the list (ibid., paras. 25 and 26). The Special Rapporteur welcomes the recent adoption of resolution 1904 (2009), in which the Council brought about further improvements to Committee procedures for listing and de-listing and established an Office of the Ombudsperson to receive requests from individuals and entities seeking to be removed from the consolidated list (see

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[43] See, for example, Bardo Fassbender "Targeted sanctions: listing/de-listing and due process", study commissioned by the Office of Legal Affairs, United Nations (2006); I. Cameron, "The European Convention on Human Rights, due process, and the United Nations Security Council counter-terrorism sanctions", report commissioned by the Council of Europe (2006).

[44] See Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, European Court of Justice (Grand Chamber), 3 September 2008; *Sayadi and Vinck v. Belgium* (Communication No. 1472/2006), final views of the Human Rights Committee, 22 October 2008.

[45] See Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, *Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights: Assessing Damage, Urging Action*, Geneva, International Commission of Jurists, 2008; I. Johnstone, "The United Nations Security Council, counter-terrorism and human rights", in *Counter-terrorism: Democracy's Challenges*, A. Bianchi and A. Keller, eds. (Oxford, United Kingdom, Portland, Oregon, United States of America, Hart Publishing, 2008).

para. 21 of the resolution). The other improvements include greater focus on information-gathering and flow of information between various actors; a strict timetable for the de-listing procedure, which limits the entire process to a maximum of six months; and the obligation of the Committee to provide explanatory comments when rejecting a de-listing request. In June 2010, Kimberly Prost, a Canadian judge, was appointed as Ombudsperson.[46]

56. Nonetheless, the Special Rapporteur remains concerned that the revised procedures for de-listing do not meet the standards required to ensure a fair and public hearing by a competent, independent and impartial tribunal established by law.[47] Under resolution 1904 (2009), the Ombudsperson does not have the decision-making power to overturn the listing decision of the Committee. The Ombudsperson is not even mandated to make recommendations to the Committee, and de-listing decisions are still taken confidentially and by consensus of a political body (the Security Council Committee established pursuant to resolution 1267 (1999)), as opposed to being the result of judicial or quasi-judicial examination of evidence. Further, access to information by the Ombudsperson continues to depend on the willingness of States to disclose information, as States may choose to withhold information in order to safeguard their security or other interests. The system continues to lack transparency since there is no obligation for the Committee to publish in full the Ombudsperson's report or to fully disclose information to the petitioner. Without decision-making powers, the Ombudsperson cannot be regarded as a tribunal within the meaning of article 14 of the International Covenant on Civil and Political Rights.[48]

57. Through the work of the Security Council Committee established pursuant to resolution 1267 (1999), the Security Council has taken on a judicial or quasi-judicial role, while its procedures continue to fall short of the fundamental principles of the right to fair trial as reflected in international human rights treaties and customary international law. For these reasons, the Special Rapporteur considers that sanctions regime to amount to action ultra vires, and the imposition by the Council of sanctions on individuals and entities under the current system to exceed the powers conferred on the Council under Chapter VII of the Charter.

58. As long as there is no independent review of listings at the United Nations level, and in line with the principle that judicial or quasi-judicial decisions by the Security Council should be interpreted as being of a preliminary rather than final character, it is essential that listed individuals and entities have access to the domestic judicial review of any measure implementing the sanctions pursuant to resolution 1267 (1999).[49] Indirect review in relation to acts by an individual State or by the European Union has been exercised by the Human Rights Committee in the case of *Sayadi and Vinck v. Belgium*[50] and in the judgment by the European Court of

[46] See http://www.un.org/News/Press/docs/2010/sc9947.doc.htm.

[47] A similar assessment can be found in David Cortright and Erika de Wet "Human rights standards for targeted sanctions", Sanctions and Security Research Program. For an overview of the right to fair trial in the fight against terrorism, see document A/63/223.

[48] See also, *Her Majesty's Treasury (Respondent) v. Mohammed Jabar Ahmed and others* (FC), [2010] UKSC 2.

[49] See also Martin Scheinin, "Is the ECJ Ruling in Kadi Incompatible with International Law?", in *Yearbook of European Law*, vol. 28 (Oxford University Press, 2010).

[50] See *Sayadi and Vinck v. Begium* (Communication No. 1472/2006), final views of the Human Rights Committee, 22 October 2008.

Justice in the cases of *Kadi and Al Barakaat*.[51] In paragraph 20 of its resolution 63/185, the General Assembly urged States, while ensuring full compliance with their international obligations, to include adequate human rights guarantees in their national procedures for the listing of individuals and entities with a view to combating terrorism. This statement should be seen as an appeal to States to implement sanctions against persons listed by the Security Council, not blindly, but subject to adequate human rights guarantees.

C. Field presences

1. Framing the issue

59. Since a United Nations operation exclusively dedicated to counter-terrorism has yet to be deployed, the Special Rapporteur has taken into consideration United Nations peacekeeping operations as a whole, as they represent the context where United Nations actors would directly be involved in counter-terrorism measures on the ground. It is problematic that the United Nations Global Counter-Terrorism Strategy does not address such direct involvement.

60. Instances of human rights violations during United Nations field operations have been documented by intergovernmental organizations, non-governmental organizations and the international press in the past. Additionally, United Nations responsibility has been addressed in litigations before regional human rights courts, with the outcome that neither the United Nations, nor the Member States in question were held to account.[52] International human rights courts have on a general level established the standard of "effective control" in order to attribute responsibility to international organizations and/or Member States.[53] In the opinion of the Special Rapporteur, this is the threshold that should trigger responsibility by the United Nations, but not to the exclusion of the responsibility of Member States for their own conduct. States remain responsible for aiding or assisting in the commission of an internationally wrongful act.[54]

61. Since United Nations operations necessarily involve action by individual Member States for which they remain responsible, the Special Rapporteur believes that the conduct of United Nations operations must comply with the substantive norms enshrined in core international human rights instruments, particularly the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. With regard to the latter, United Nations operations in the field must be realized in a manner that minimizes negative impact upon human rights (e.g., access to education, social and health services, places of

[51] See Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, European Court of Justice (Grand Chamber), 3 September 2008.

[52] European Court of Human Rights, admissibility decisions on *Agim Behrami and Bekir Behrami v. France* (Application No. 71412/01), and *Ruzhdi Saramati v. France, Germany and Norway* (Application No. 78166/01), 2 May 2007.

[53] European Court of Human Rights, *Loizidou v. Turkey (Application No. 15318/89)*, 18 December 1996.

[54] See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10), chap. IV, part one, article 16.

employment).[55] In terms of the former, the limits to power of States to derogate from human rights,[56] must apply also in the context of United Nations operations.

2. Selected substantive issues

62. Reports on several current[57] and past peacekeeping operations reveal that they have been realized with a considerable "human rights cost".[58] As the United Nations assumes powers akin to those of States, the bulk of the problems that arise relate to four core categories of issues: detention; fair trial, non-refoulement and the prohibition of torture or cruel, inhuman or degrading treatment.

63. Detention directly affects the right to liberty and security of individuals. International standards require that detention be neither unlawful nor arbitrary and that sufficient guarantees exist both at the time of arrest and throughout the whole period of detention. The conditions of detention and the treatment of detainees are regulated in international human rights law[59] so as to ensure that minimum standards are secured under any circumstances.[60]

64. Reports on United Nations operations over the past years have brought to light instances that fall short of the requirements established by articles 9 and 10 of the International Covenant on Civil and Political Rights.[61] Detention-related problems have also been reported, such as excessive length of pretrial detention, non-observance of the right to a fair trial within a reasonable time, lack of provision of legal assistance, ill-treatment of detainees and poor conditions of detention.[62]

65. The United Nations has been called upon to administer areas or operate in an environment where the legal regime in terms of applicable law is dubious and in terms of material resources insufficient or virtually non-existent. Several of the problems that have occurred in the past relate to the right to be tried within a

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[55] See A/HRC/6/17/Add.4, para. 39, and Corr.1, and Mac Darrow and Louise Arbour, "The pillar of glass: human rights in the development operations of the United Nations", *American Journal of International Law*, vol. 103 (2009), p. 475.

[56] See General Comment No. 29 of the Human Rights Committee.

[57] Currently, 15 operations are in place; see http://www.un.org/apps/news/html/resources.shtml.

[58] Reports of sexual exploitation of women and children are particularly alarming in this regard. For identification of issues and recommendations, see final report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, A/HRC/14/24, paras. 78-80.

[59] See Economic and Social Council resolution 663C (XXIV) on standard minimum rules for the treatment of prisoners, General Assembly resolution 43/173, on "Body of principles for the protection of all persons under any form of detention or imprisonment", articles 9 and 10 of the International Covenant on Civil and Political Rights; Human Rights Committee, General Comment No. 8 and General Comment No. 21.

[60] Human Rights Committee, *Albert Womah Mukong v. Cameroon*, CCPR/C/51/D/458/1991, para. 9.3.

[61] Amnesty International, "Federal Republic of Yugoslavia (Kosovo): setting the standard? UNMIK and KFOR's response to violence in Mitrovica", EUR 70/013/2000 (2000). Available from http://www.amnesty.org/en/library/info/EUR70/013/2000/en.

[62] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, report to the United Nations Interim Administration in Kosovo (UNMIK) on the visit to Kosovo, 20 January 2009. Available from http://www.cpt.coe.int/documents/srb/2009-03-inf-eng.pdf.

reasonable time, inconsistent provision of legal assistance and flaws in the procedural aspects of trials.[63]

66. Article 33 of the Convention relating to the Status of Refugees and the provisions of international human rights treaties, including article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and article 7 of the International Covenant on Civil and Political Rights, prohibit refoulement of individuals when their lives and/or freedom would be threatened.[64] This relates also to situations of transferring a person to the hands of another entity, such as the authorities of the territorial State.[65] United Nations operational branches on the ground are under an obligation to ensure that individuals coming within their control benefit from this protection.

67. United Nations peacekeeping troops attempts to establish order in Somalia in 1993 were met with allegations of torture and various other serious human rights abuses, which were eventually verified.[66] Regrettably, the perpetration of those acts damaged the image of the United Nations as a human rights promoter and defender.

IV. Conclusions and recommendations

A. Conclusions

68. The increased attention paid by the General Assembly to the promotion and protection of human rights while countering terrorism is reflected in a number of resolutions adopted on the subject as well as in the United Nations Global Counter-Terrorism Strategy. In the framework of its Ad Hoc Committee (on terrorism) as well as the working group of the Sixth Committee, the General Assembly has continued its work in the field of codifying international law on terrorism, with the draft comprehensive convention on international terrorism remaining unfinished. The challenge remains to mainstream a human rights-based approach throughout all United Nations entities working on counter-terrorism related issues, including through the Counter-Terrorism Implementation Task Force and increase cooperation and integration with and between United Nations human rights entities, including the Human Rights Council, its special procedures and the United Nations High Commissioner for Human Rights and her Office.

69. The Special Rapporteur considers that whatever justification the Security Council may have had in September 2001 for the adoption of resolution 1373 (2001), its continued application nine years later cannot be seen as a proper response to a specific threat to international peace and security. Resolution 1373 (2001) goes beyond the powers conferred upon the Security Council and continues to pose risks to the protection of a number of international human rights standards.

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[63] Amnesty International, "Kosovo (Serbia and Montenegro): United Nations Interim Administration Mission in Kosovo (UNMIK): conclusions of the Human Rights Committee, eighteenth session, July 2006".

[64] See Human Rights Committee, General Comment No. 20, para. 9.

[65] See *Al-Saadoon and Mufdhi v. United Kingdom*, European Court of Human Rights, Chamber Judgment of 2 March 2010.

[66] See *Human Rights Watch World Report 1994: Somalia*, and *Amnesty International Report 1994: Somalia*.

70. Through the work of the Security Council Committee established pursuant to resolution 1267 (1999), the Security Council has taken on a judicial or quasi-judicial role, while its procedures continue to fall short of the fundamental principles of due process as reflected in international human rights treaties and customary international law. The Special Rapporteur considers that the imposition by the Council of sanctions on individuals and entities under the current system exceeds the powers conferred upon the Council under Chapter VII of the Charter.

71. The Special Rapporteur is concerned about the lack of a holistic, coherent and comprehensive human rights strategy to address the responsibility under international law of the United Nations for its operations in the field. The current credibility gap that the United Nations is facing is damaging to its legitimacy in the field of human rights, which strikes at the very identity of the Organization.

B. Recommendations

General Assembly

72. The Special Rapporteur calls upon Member States, including through the General Assembly, and in line with their commitment to the United Nations Global Counter-Terrorism Strategy:

(a) To provide the United Nations system with resources and mandates to promote a human rights-based approach to counter-terrorism, to mainstream international human rights standards throughout all United Nations entities working on counter-terrorism related issues and to increase cooperation and integration with United Nations human rights entities;

(b) To carry forward the Strategy at the national level, ensuring the centrality of the respect for human rights and the rule of law as the fundamental basis of the fight against terrorism as set out in the Strategy, and to fully implement the specific human rights commitments spelled out in the annual resolutions of the Assembly on the protection of human rights and fundamental freedoms while countering terrorism;

(c) To continue to work towards the completion of the draft comprehensive convention on international terrorism, keeping in mind that only a legally precise definition of terrorism that respects the principle of legality and that is restricted to conduct that is truly terrorist in nature, will help stop the use of abusive national definitions;

(d) Through the General Assembly, in the context of reviewing the implementation of the Strategy and otherwise, to support the role of promoting and protecting human rights in any successful action against terrorism.

Counter-Terrorism Implementation Task Force

73. The Special Rapporteur encourages the Counter-Terrorism Implementation Task Force to take into account human rights considerations in all aspects of its work, in line with the United Nations Global Strategy on Counter-Terrorism, and ensure that each working group incorporates a human rights component and perspective.

Human Rights Council

74. The Special Rapporteur encourages the Human Rights Council to consider in a more systematic way the recommendations contained in the reports on human rights and counter-terrorism submitted by the Special Rapporteur and the United Nations High Commissioner for Human Rights in formulating concrete recommendations to States and in deciding its own course of action. He also calls for better coordination between the Human Rights Council, the General Assembly and the United Nations High Commissioner in order to bring about an increase in the overall share of the special procedures in the budget of OHCHR, so that he and other special rapporteurs will be able to pursue their mandates and meet the needs of the Human Rights Council.

Security Council

75. The Special Rapporteur calls upon the Security Council:

(a) To seize the opportunity of the approaching tenth anniversary of resolution 1373 (2001) to replace resolutions 1373 (2001), 1624 (2005) and 1267 (1999) (as amended) with a single resolution, not adopted under Chapter VII of the Charter, in order to systematize the counter-terrorism measures and reporting duties of States under one framework;

(b) As part of the reform, to replace the sanctions regime pursuant to resolution 1267 (1999) by advice and assistance to Member States in maintaining their national terrorist lists and in reporting on them, and on available due process guarantees;

(c) To include a proper human rights clause in the new resolution, along the lines of Security Council resolution 1822 (2008), thereby also affirming the duty of the United Nations itself to comply with international human rights law;

(d) To ensure that counter-terrorism action by the Security Council and its subsidiary bodies systematically reflects the double role of the promotion and protection of human rights in the United Nations Global Counter-Terrorism Strategy, namely as one pillar of the strategy and a component in all other pillars.

76. In respect of the systemic reform proposed above, the Special Rapporteur:

(a) Calls on States that apply sanctions pursuant to resolution 1267 (1999) to provide for a judicial review at the national level of implementing measures;

(b) Calls on the Security Council Committee established pursuant to resolution 1267 (1999) to: (i) fully consider suggestions made by the Ombudsperson regarding de-listing requests under resolution 1904 (2009); and (ii) fully cooperate with the Ombudsperson, including by providing all relevant information.

77. The Special Rapporteur also calls on the Counter-Terrorism Committee and its Executive Directorate:

(a) To improve the transparency of the work of the Committee by making public its conclusions and recommendations to States, while not exposing vulnerabilities to terrorism;

(b) To replace the generic human rights question posed to States pursuant to resolution 1624 (2005) with specific ones, based on the experience gained in respect

of the sensitive areas related to implementation of resolutions 1373 (2001) and 1624 (2005) and the specific human rights guidelines contained in the 2009 technical guide to the implementation of Security Council resolution 1373 (2001);

(c) To increase cooperation with the mandate of the Special Rapporteur in the field of country assessment and advice;

(d) To continue to take into account the findings of the Special Rapporteur from country visits and the findings of relevant human rights bodies in country assessments of the implementation of resolution 1373 (2001);

(e) To strengthen the role of human rights assessments in the day-to-day operation of the Counter-Terrorism Committee Executive Directorate, including through increased capacity within Directorate and closer cooperation with OHCHR.

Field presences

78. With a view to securing comprehensive monitoring of United Nations human rights obligations in its field operations, including any involvement in counter-terrorism operations, the Special Rapporteur:

(a) Invites the United Nations to consider the drafting of a uniform code of conduct for counter-terrorism and other field operations;

(b) Suggests the creation of a new, autonomous, ombudsperson body charged with oversight of the human rights aspect of United Nations operations, including those that have a counter-terrorism component;

(c) Calls upon the United Nations to elaborate a comprehensive human rights governance policy, applicable also in the counter-terrorism context.

79. For the implementation of the previous recommendation, the Special Rapporteur recommends the development of specific tools, including:

(a) A basic code of criminal procedure for United Nations troops, including the criminalization of the violation of human rights prescribed in the core international human rights instruments;

(b) A United Nations human rights manual for counter-terrorism operations based on the current best practices and policies of all States;

(c) A bulletin of the Secretary-General on the observance of international human rights law by United Nations forces, including identification of specific obligations therein;

(d) Inclusion in all future status-of-forces agreements of a standard human rights clause, in order to ensure that the perpetrators of human rights violations are held responsible by either the sending or receiving country.

80. The Special Rapporteur invites States to move towards the establishment of a world court of human rights endowed with a special *ratione personae* jurisdiction over the United Nations and its organs.

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Item 69 (b) of the provisional agenda*
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Human rights and extreme poverty

Note by the Secretary-General

The Secretary-General has the honour to transmit to the Members of the General Assembly the report on the question of human rights and extreme poverty submitted by Magdalena Sepúlveda Carmona, independent expert on the question of human rights and extreme poverty, in accordance with resolution 8/11 of the Human Rights Council.

* A/65/150.

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Report of the independent expert on the question of human rights and extreme poverty

Summary

The present report highlights the importance of social protection measures in the Millennium Development Goals agenda. It also stresses that social protection measures designed, implemented and evaluated within the framework of a rights-based approach are more likely to ensure the achievement of the Goals and to result in long-term improvements. In addition, the report argues that the use of a rights-based approach to social protection can maximize synergies across the Millennium Development Goals and have greater effect in terms of reducing extreme poverty and inequality.

As in previous reports, the independent expert outlines the main features of a rights-based approach to social protection. She pays particular attention to gender-related concerns as one of the core components of such an approach.

The report calls on States to devote increased attention to the issue of gender equality while designing, implementing and evaluating social protection programmes within a human rights framework.

Contents

		Page
I.	Background	4
II.	Human rights and social protection	5
III.	The contribution of social protection to the achievement of the Millennium Development Goals	7
	A. Eradicating extreme poverty and hunger (Goal 1)	7
	B. Achieving universal primary education (Goal 2)	9
	C. Promoting gender equality and empowering women (Goal 3)	10
	D. Reducing child mortality, improving maternal health, and combating HIV/AIDS, malaria and other diseases (Goals 4, 5 and 6)	11
	E. Ensuring environmental sustainability (Goal 7)	12
	F. Developing a global partnership for development (Goal 8)	14
IV.	Gender inequalities and the implementation of social protection systems	14
	A. Gender inequality and vulnerability to poverty	15
	B. Social protection programmes and the contribution of women as caregivers	16
	C. Developing gender-aware social protection initiatives	16
V.	A human rights approach to social protection for the achievement of the Millennium Development Goals	18
	A. Recognizing State obligations to provide social protection and ensuring an adequate legal and institutional framework	19
	B. Adopting comprehensive, coherent and coordinated policies	19
	C. Respecting the principles of equality and non-discrimination	20
	D. Establishing gender-aware social protection	21
	E. Guaranteeing participation, transparency and accountability	23
	F. Strengthening international assistance and cooperation	24
VI.	Conclusions	24

I. Background

1. The Human Rights Council, in its resolution 8/11, requested the independent expert on the question of human rights and extreme poverty to examine further the relationship between the enjoyment of human rights and extreme poverty. The resolution also called upon the expert to, inter alia, pay particular attention to the situation and empowerment of women in extreme poverty, and submit recommendations that could contribute to the realization of Millennium Development Goals.

2. In the 2000 Millennium Declaration (General Assembly resolution 55/2), political leaders committed themselves to "spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty". Over the past decade, with this goal in mind, several States have put in place or strengthened social protection initiatives to address the persistence of extreme poverty. Successful stories in various regions indicate that even low-income countries can make significant progress on the Millennium Development Goals by establishing and implementing well-designed social protection initiatives.

3. The present report highlights the importance of social protection measures in facilitating the achievement of the Goals. However, it stresses that social protection measures designed, implemented and evaluated using a rights-based approach are more likely to result in long-term improvements.

4. As in previous reports,[1] the independent expert outlines the main features of a rights-based approach to social protection and highlights the fact that gender sensitivity must be at the core of any rights-based social protection programme. While past reports have emphasized various components of a rights-based approach to social protection, particularly cash transfers and social pensions, the present report focuses on gender-related concerns. Furthermore, the report argues that the use of a rights-based approach to social protection can maximize synergies across the Millennium Development Goals and ensure that they work together with greater effect in reducing extreme poverty and inequality.

5. To assist in the preparation of the present report, the independent expert sent a questionnaire to Governments requesting detailed information about various social protection programmes as they relate to various Millennium Development Goals. The questionnaire asked about the possible contributions of social protection to the achievement of each of the Goals, requesting descriptions of the methods used to identify the most vulnerable groups, the specific initiatives developed to respond to their needs and the specific components included in such initiatives in order to promote participatory processes and accountability. As of 5 August 2010, 32 countries had responded; all submissions are available on the webpage of the mandate of the independent expert.[2]

6. The present report also benefited from a review of the existing literature and an expert meeting convened by the independent expert and the Rutgers University

[1] See A/64/279, A/HRC/11/9 and A/HRC/14/31.

[2] Armenia, Belarus, Bolivia (Plurinational State of), Botswana, Brazil, Colombia, Côte d'Ivoire, Cyprus, Finland, Georgia, Greece, Indonesia, Japan, Lithuania, Mexico, Nepal, Nicaragua, the Niger, Panama, Paraguay, Peru, Poland, Qatar, the Russian Federation, Slovakia, Slovenia, South Africa, Spain, Sweden, Turkey, Ukraine and the United Republic of Tanzania. All responses are available at http://www2.ohchr.org/english/issues/poverty/expert/mdg.htm.

Center for Women's Global Leadership, at the Office of the United Nations High Commissioner for Human Rights from 1 to 2 June 2010. Experts from Governments, United Nations agencies, non-governmental organizations and academic institutions attended the meeting and contributed to the independent expert's work.

7. The independent expert expresses her gratitude to all States that submitted information and to the experts and non-governmental organizations that supported this process and assisted in the preparation of the present report. In future mission reports, she will continue to consider the topics addressed below.

II. Human rights and social protection

8. For the purposes of the present report, "social protection" refers to policies and programmes aimed at enabling people to respond to various circumstances and manage levels of risk or deprivation deemed unacceptable by society. The objectives of these schemes are to offset deprivation and ensure protection from, inter alia, the absence or substantial reduction of income from work; insufficient support for families with children or adult dependents; lack of access to health care; general poverty; and social exclusion.

9. Social insurance and social assistance are the two main segments of social protection.[3] "Social insurance" refers to contributory insurance schemes providing pre-specified support for affiliated members. "Social assistance" encompasses initiatives providing both cash and in kind assistance to those living in poverty. Relevant social protection measures addressing the needs of those living in extreme poverty include cash transfer schemes, public-works programmes, school stipends, social pensions, food vouchers and transfers, and user-fee exemptions for health care, education or subsidized services.

10. The duty to implement social protection policies to expand the protection available to persons living in extreme poverty flows directly from a number of human rights, in particular the right to social security and the right to an adequate standard of living, which are enshrined in the Universal Declaration of Human Rights, several international and regional human rights treaties,[4] conventions of the International Labour Organization (ILO),[5] and national constitutions. Ensuring access to social protection is thus not a policy option, but a State obligation under international human rights law. Understood in this way, human rights can greatly contribute to the building of the political support necessary to establish and expand social protection systems.

11. States must comply with the international human rights legal framework when designing, implementing, monitoring and evaluating social protection programmes.

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[3] The present report uses the terms "social protection" and "social security" interchangeably. See Committee on Economic, Social and Cultural Rights general comment No. 19.

[4] See articles 9, 10 and 11 of the International Covenant on Economic, Social and Cultural Rights, article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 11 of the Convention on the Elimination of All Forms of Discrimination against Women, article 26 of the Convention on the Rights of the Child, article 27 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, and article 28 of the Convention on the Rights of Persons with Disabilities.

[5] See Declaration of Philadelphia and ILO Convention No. 102 (1952), on social security (minimum standards).

To be sure, human rights standards do not provide answers to all the challenges faced by policymakers when designing social protection programmes. They do, however, impose legally binding obligations governing the discretion of States. Those obligations not only require States to put social protection systems in place, but also determine the manner in which they do so (obligations related to the process) and the intended results of such systems (obligations related to the outcome). Moreover, rights-based social protection measures help States to fulfil several human rights obligations, including ensuring the enjoyment of the right to the highest attainable standard of physical and mental health; the right to education, the protection of the family and maternity benefits; the right to fair and equal remuneration for work; and the specific rights of vulnerable groups such as children, older persons and persons with disabilities.

12. The elimination of all forms of discrimination, including gender-based discrimination, is an overarching human rights principle that must guide the conduct of States.[6] Given that gender inequality is a cause and a factor that perpetuates it, effective development strategies must take into account State obligations regarding gender equality and the protection of the full range of women's rights. This is made clear in the Beijing Declaration, which affirms that the "[e]radication of poverty based on sustained economic growth, social development, environmental protection and social justice requires the involvement of women in economic and social development, equal opportunities and the full and equal participation of women and men as agents and beneficiaries of people-centred sustainable development".

13. Compliance with those principles is particularly important in the implementation of social protection systems. This stems from the International Covenant on Economic Social and Cultural Rights, which prohibits any form of discrimination in the fulfilment of all economic, social and cultural rights, including the right to social security, and ensures the equal rights of men and women. The Convention on the Elimination of All Forms of Discrimination against Women, inter alia, obliges States parties to eliminate or amend policies and practices resulting in unequal access for women to public services such as health care and family benefits. It also highlights the unique challenges faced by working women during pregnancy and maternity and it encourages States to ensure that women have access to various social services that support them as they balance their work and family obligations.

14. Efforts to advance a development agenda based on human rights must address State obligations concerning gender equality and women's empowerment. Since several social protection programmes, such as cash or asset transfer schemes, and public-works schemes, explicitly target women, it is often assumed that gender issues are already addressed. Such targeting, however, does not mean that gender dynamics have been adequately taken into account in the design, implementation and evaluation of such programmes. Owing to existing economic, social and cultural inequalities, women face a number of obstacles that affect their ability to benefit from social protection schemes. States must therefore examine and address the roles

[6] See articles 2 (2) and 3 of the International Covenant on Economic, Social and Cultural Rights, articles 2 (1), 3 and 26 of the International Covenant on Civil and Political Rights, article 2 (1) of the International Convention on the Elimination of All Forms of Racial Discrimination, article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, article 2 (1) of the Convention on the Rights of the Child, article 1 (1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and article 4 (1) of the Convention on the Rights of Persons with Disabilities.

that power and gender dynamics play in the implementation, sustainability and impact of social programmes. Otherwise, such programmes may increase the vulnerability and inequality of women, and thus fail to comply with human rights standards.

III. The contribution of social protection to the achievement of the Millennium Development Goals

15. While the impacts of social protection programmes vary according to their objectives, their design and their level of implementation, as well as the level of development in the areas where they are implemented, there is strong evidence that such initiatives can significantly contribute to the reduction of extreme poverty and can thus be instrumental to the achievement of the Millennium Development Goals.[7]

A. Eradicating extreme poverty and hunger (Goal 1)

16. Social protection contributes to the achievement of Millennium Development Goal 1 (eradicate extreme poverty and hunger) by transferring resources to those living in extreme poverty, enabling the beneficiaries to generate income, protect their assets and accumulate human capital.[8]

17. At a basic level, social protection has the potential to shield the most vulnerable segments of society from various "shocks". These include personal crises such as lack of income due to unemployment, disability or sickness, as well as crises at the macro level such as economic slowdowns, large-scale structural adjustments or, increasingly, crises due to climate-change-related environmental degradation[9] (including crop failures, flooding and droughts). By transferring resources to those in need, social protection increases consumption, reduces a household's extreme vulnerabilities and prevents further deterioration in living conditions. Evidence suggests that without social protection, there will be, inter alia, an increase in poverty and the prevalence of child labour and HIV/AIDS, higher levels of exclusion from access to health and education, and low access to productive activities.[10] Social protection also helps to keep individuals who live on or close to the poverty line from backsliding into poverty following a sudden loss of income or increase in expenses.[11]

18. Moreover, several kinds of social protection programmes contribute to income generation and enable recipients to accumulate and protect assets, building their

[7] For a comprehensive study on the impact of cash transfer programmes, see A. Barrientos and M. Niño-Zarazua, *Effects of Non-contributory Social Transfers in Developing Countries: A Compendium* (Brooks World Poverty Institute, University of Manchester, 2010).

[8] World Bank, *The Contribution of Social Protection to the Millennium Development Goals* (2003); United Nations Development Programme (UNDP), *What Will It Take to Achieve the Millennium Development Goals? An International Assessment* (2010).

[9] M. Davies, K. Oswald and T. Mitchell, "Climate Change Adaptation, Disaster Risk Reduction and Social Protection", in *Promoting Pro-Poor Growth: Social Protection* (Organization for Economic Cooperation and Development, 2009).

[10] ILO, *World Social Security Report 2010/11: Providing coverage in times of crisis and beyond*, p. 8.

[11] W. van Ginneken, *Managing Risk and Minimizing Vulnerability: The Role of Social Protection in Pro-Poor Growth* (ILO, 2005),

resilience in the face of shocks and increasing their chances of escaping extreme poverty. The additional income that social protection provides through various types of cash or in kind transfers and microcredit schemes enables families and individuals to accumulate savings, engage in long-term planning and invest in productive assets.[12] Increasingly, social protection programmes are also designed to enable households to invest in human capital development, thus preventing poverty from being passed on from one generation to the next.

19. Many studies note the potential of social protection initiatives to promote progress towards the achievement of Millennium Development Goal 1, in particular target 1: halving income poverty by 2015. The World Bank estimates that social protection interventions could reduce the total poverty head-count rate by 5 to 10 per cent.[13] Data from national flagship programmes show such results. In Mexico, for example, the PROGRESA programme, a cash transfer scheme, may have led to a 36 per cent decrease in the poverty gap among beneficiaries.[14] Together with an increase in the minimum wage, Brazil identifies the expansion of its cash transfer programme, "Bolsa Familia", as the reason for its having met target 1 ahead of schedule.[15]

20. Numerous studies demonstrate that specific cash transfer programmes have been effective in working towards target 2 of the Millennium Development Goals: halving the number of persons suffering from hunger by 2015. For example, the Productive Safety Net Programme in Ethiopia, the National Rural Employment Guarantee Scheme in India, the initiative "Challenging the Frontiers of Poverty Reduction: Targeting the Ultra-Poor" in Bangladesh and the Kalomo District Pilot Social Cash Transfer Scheme in Zambia have all improved nutritional levels.[16] In a wide range of programmes and countries, there is strong evidence of a direct link between income supplementation and food consumption among beneficiary households.[17] A number of countries have noted the possible role of school meal programmes and the distribution of food baskets in the achievement of significant gains towards the fulfilment of target 2.[18]

21. In all instances, by protecting vulnerable groups, preventing regression into poverty, promoting income generation and investing in human capital, social protection programmes help to reduce income poverty and hunger. However, such programmes must be supported by sound macroeconomic and fiscal policies in order to ensure their long-term sustainability.[19] Moreover, their effectiveness in the attainment of human development objectives is greater when adequate social services are available.

22. While reducing income poverty is an essential first step towards the achievement of other development goals, extreme poverty cannot be defined simply in terms of income, and poverty reduction should not be measured solely on the

[12] Ibid., E. Sadoulet, A. de Janvry and B. Davis, *Cash Transfer Programmes with Income Multipliers: PROCAMPO in Mexico* (Food and Agriculture Organization of the United Nations, 2001).

[13] World Bank, *The Contribution of Social Protection to the Millennium Development Goals* (2003), p. 8.

[14] R. Künnemann and R. Leonhard, *A Human Rights View of Social Cash Transfers for Achieving the Millennium Development Goals* (Brot für die Welt, 2008), p. 10.

[15] Instituto de Pesquisa Economica Aplicada e Secretaria de Planejamento e Investimentos Estrategicos, *Objetivos de Desenvolvimento do Milenio* (2007), p. 26.

[16] Barrientos and Niño-Zarazua, *Effects of Non-Contributory Social Transfers*, p. 14.

[17] Ibid.

[18] Questionnaire responses of Brazil and Paraguay (see footnote 2).

[19] UNDP, *What Will It Take to Achieve the Millennium Development Goals?*

basis of global targets. Even if Millennium Development Goal 1 is achieved by 2015, it is likely that many of those living in extreme poverty will not be reached. Furthermore, the Goal may increase the incentives for States to focus attention on those most easily reached, namely, individuals living just below the poverty line, rather than those who are most marginalized and in need of help. States should adopt development plans that include precise national benchmarks and targets, fulfilling human rights obligations so as to ensure that those in extreme poverty are reached. Such obligations include those imposed by the International Covenant on Economic, Social and Cultural Rights, which requires States parties to take progressive measures to realize fully all economic, social and cultural rights while also ensuring minimum essentials for all.[20] Once again, this illustrates the importance of social protection measures, particularly social assistance measures, in prioritizing those in extreme poverty and in promoting universal protection as soon as resources allow.

B. Achieving universal primary education (Goal 2)

23. Social protection programmes often increase demand for education, therefore contributing to the realization of the right to education. Empirical evidence shows a close link between family income and the education of children.[21]

24. There are many examples of social protection programmes that directly target improvements in the school enrolment of children of beneficiary households by imposing conditionalities (co-responsibilities) related to school attendance and performance rates. Moreover, programmes that lack an explicit focus on schooling can also have a positive impact on the education level of children. For example, research shows that social pensions (non-contributory pensions for older persons) in Brazil, South Africa and Namibia have been used by grandparents to pay their grandchildren's school fees.[22]

25. While cash transfers enable families to absorb the costs associated with schooling,[23] other programmes, such as school feeding programmes or initiatives that provide fee waivers or subsidies for low-income families with children, also appear to be associated with higher school attendance levels.[24]

26. Several studies indicate a strong positive correlation between a family's vulnerability to economic shocks and a child's early entry into the labour market and reduced school attendance. A family that experiences a severe shock, for example, may have to remove a child from school in order to send him or her to work. Evidence from Latin America suggests that greater family access to risk

[20] See Committee on Economic, Social and Cultural Rights general comment No. 3, para. 10.

[21] Economic and Social Commission for Asia and the Pacific (ESCAP), *Achieving the MDGs in an Era of Global Uncertainty? Asia-Pacific Regional Report 2009/10* (2010), p. 58.

[22] S. Devereux, *Social Pensions in Namibia and South Africa* (Institute of Development Statistics, 2001); I. E. de Carvalho Filho, *Household Income as a Determinant of Child Labour and School Enrolment in Brazil: Evidence from a Social Security Reform* (International Monetary Fund, 2008).

[23] World Bank, *The Contribution of Social Protection to the Millennium Development Goals*, p. 4; A/HRC/11/9, p. 19.

[24] A. Barrientos and R. Holmes, *Social Assistance in Developing Countries Database* (Brooks World Poverty Institute, University of Manchester, and Overseas Development Institute, 2006).

management instruments, such as unemployment benefits or disability benefits, directly reduces the prevalence of child labour.[25]

27. In some cases, investment in infrastructure through public-works projects increases access to and the quality of educational facilities. Such projects can take the form of the building of schools[26] or of roads or bridges improving access to them. Several studies demonstrate the contributions of such investments to higher school enrolment rates and to the total number of years of accumulated education in the communities concerned.[27]

28. However, the independent expert stresses the need to be cautious in evaluating progress towards the achievement of Millennium Development Goal 2 (achieve universal primary education) through targets based solely on enrolment numbers. Whether the detected positive effects on school enrolment translate into substantive gains in education is a question still open for debate. While school enrolment and attendance are necessary, the establishment of additional policies to ensure the availability and adequacy of schools, the high quality of education and the transition from school to the labour market is also essential.

C. Promoting gender equality and empowering women (Goal 3)

29. When social protection is implemented within the framework of a gender-sensitive approach (as elaborated below), it enhances the status of women by, inter alia, strengthening their economic power, improving girls' access to education, increasing the participation of women in the workforce and providing them with income security in old age. Anecdotal evidence suggests that, by enabling them to gain control over household resources, some programmes directed at women have improved their social status and their confidence within their families and communities.[28]

30. Nonetheless, social protection programmes have limits. Many countries pride themselves on having achieved quantifiable improvements in gender equality, especially regarding girls' access to education. For example, the Female Secondary School Assistance Project in Bangladesh, which provides girls with a stipend so that they can attend school, has been recognized as successful in raising enrolment rates for girls.[29] However, States must take care not to limit their efforts to promote gender equality to improving parity between girls' and boys' enrolment rates. While stipends promoting girls' enrolment are important, they must be accompanied by broader measures addressing other concerns of particular importance to women, such as gender-based violence, including harmful traditional practices (for example, female genital mutilation and child marriage). Several countries have expressed

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[25] F. C. Rosati, A. Cigno and Z. Tzannatos, *Child Labour Handbook*, Social Protection Discussion Paper No. 0206 (World Bank, 2002).

[26] World Bank, *The Contribution of Social Protection to the Millennium Development Goals*, pp. 12-13.

[27] L. Rawlings, L. Sherburne-Benz and J. van Domelen, *Evaluating Social Fund Performance: A Cross-Country Analysis of Community Investments* (World Bank, 2003).

[28] Barrientos and Niño-Zarazua, *Effects of Non-Contributory Social Transfers*, p. 30; M. Molyneux, *Change and Continuity in Social Protection in Latin America: Mothers at the Service of the State?* (United Nations Research Institute for Social Development, 2007).

[29] A. Schurmann, *Review of the Bangladesh Female Secondary School Stipend Project Using a Social Exclusion Framework* (*Journal of Health, Population and Nutrition*, August 2009).

frustration at the narrowness of some of the indicators for Millennium Development Goal 3 (promote gender equality and empower women) and have chosen to focus their energies on their own indicators related to gender equality, such as formal workforce participation, wage gaps, political participation and domestic violence.[30] The independent expert believes States should adopt or revise national targets and indicators for all Millennium Development Goals in line with their obligations under human rights law, in order to accelerate their progress in achieving the Goals.

31. In any serious policy discussion about the Millennium Development Goals, their links with the gender dynamics of power, poverty and vulnerability must be recognized. A gender-sensitive approach towards the Goals can maximize synergies and help to tackle the root causes of poverty and vulnerability, thus helping to achieve all of the Millennium Development Goals, rather than just Goals 3 and 5.[31] Moreover, the Goals currently have limited gender-sensitive targets and indicators, and must be complemented by States' obligations regarding women's rights under international human rights law.

D. Reducing child mortality, improving maternal health, and combating HIV/AIDS, malaria and other diseases (Goals 4, 5 and 6)

32. While accessible, high-quality and gender-sensitive health-care services contribute to the achievement of Millennium Development Goals 4, 5 and 6,[32] social protection also contributes, both directly and indirectly, by addressing fundamental economic obstacles that result in health challenges, improving the overall standard of living and promoting the right to health.

33. Research indicates a possible relationship between social protection and declines in child mortality (Goal 4). For example, by eliminating financial disincentives, cash transfer programmes directed at families with small children have demonstrably increased the number of regular medical check-ups for such children, thus reducing the risk of child mortality.[33] Such programmes have also been effective in increasing the child immunization rates, reducing the incidence of illness and, in extreme cases, premature death.[34] Similarly, food transfers have demonstrably reduced malnutrition among children.[35]

34. Social protection can also promote maternal health (Goal 5). For example, social cash transfers, which provide additional income, can be used by beneficiaries

[30] Instituto de Pesquisa Economica Aplicada e Secretaria de Planejamento e Investimentos Estrategicos, *Objetivos de Desenvolvimento do Milenio*, pp. 50-65; questionnaire response of Colombia (see footnote 2).

[31] R. Holmes and N. Jones, *Gender-Sensitive Social Protection and the MDGs* (Overseas Development Institute, 2010).

[32] Owing to the similarity of the social protection interventions that address them, these Millennium Development Goals have been grouped together.

[33] Barrientos and Holmes, *Social Assistance in Developing Countries Database*; J. M. Aguero, M. R. Carter and I. Woolard, *The Impact of Unconditional Cash Transfers on Nutrition: The South African Child Support Grant* (UNDP, 2007).

[34] Barrientos and Niño-Zarazua, *Effects of Non-Contributory Social Transfers*.

[35] Barrientos and Holmes, *Social Assistance in Developing Countries Database*; see also footnote 22.

to cover health-care and transportation costs. Evaluations of the "Juntos" scheme in Peru, a conditional cash transfer programme, showed an increase of approximately 65 per cent in the number of prenatal and post-natal visits to health clinics and a reduction in the number of home births in areas where there were high levels of maternal mortality.[36] In addition, social funds supporting the development of local health-care infrastructure have been proved effective in reducing infant mortality rates.

35. Evidence also shows the positive impacts of social protection for people living with HIV/AIDS and their families. For example, in a number of African countries in which HIV/AIDS is prevalent, universal old-age pensions have significantly improved the lives of AIDS orphans raised by their grandparents.[37] There are also programmes that are testing how financial incentives in the form of cash transfers could have a positive impact in preventing HIV/AIDS (Goal 6). For example, the RESPECT Project, a pilot cash-transfer programme in the United Republic of Tanzania, uses cash as an incentive to reduce risky sexual activity among young people, male and female, who are at high risk for HIV infection and to provide counselling and periodic screening for sexually transmitted infections. The final outcomes of this approach have yet to be seen, and further human rights analyses are required.

36. The effects of social protection measures such as cash and in-kind transfers on the health status of persons living in extreme poverty will not be consolidated unless they are accompanied by adequate investment in the provision of health care and the guarantee of access to medicines. Also essential is coordination among various social policies, including coordination between programme managers and health service providers, to ensure adequate, accessible and gender-sensitive health-care services, even in the most remote and vulnerable communities. In addition, States should provide mass immunizations and public health awareness campaigns.[38]

E. Ensuring environmental sustainability (Goal 7)

37. Environmental degradation disproportionately affects those living in extreme poverty. Data show that extreme weather events such as storms, droughts and cyclones have particularly severe effects on those living in poverty and pose real and direct threats to their ability to live their lives in dignity. In most cases, they rely on natural resources for their basic means of survival and are less able to prepare for, or adapt to, climate change and its effects.

38. Extreme weather events caused by climate change can create vicious circles by increasingly forcing persons living in extreme poverty to over-exploit natural resources as a coping mechanism to ensure survival.[39] Any attempt to reduce

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[36] Barrientos and Niño-Zarazua, *Effects of Non-Contributory Social Transfers*.

[37] HelpAge International, *Age and Security: How Social Pensions Can Deliver Effective Aid to Poor Older People and Their Families* (2004).

[38] M. Adato and L. Bassett, *What is the Potential of Cash Transfers to Strengthen Families Affected by HIV and AIDS? A Review of the Evidence on Impacts and Key Policy Debates* (International Food Policy Research Institute, 2008); UNDP, *What Will It Take to Achieve the Millennium Development Goals?*

[39] ESCAP, *Achieving the MDGs in an Era of Global Uncertainty*, p. 59.

poverty must be accompanied by efforts to tackle and mitigate the effects of climate change at the country, community and individual levels.[40]

39. Social protection programmes can shield the most vulnerable and marginalized from shocks caused by environmental degradation as a result of climate change and help them to adapt and meet their needs without undermining the capacity of the environment to provide for those needs over the long term.

40. For example, appropriate social protection programmes could include cash transfers to those who are most vulnerable to climate change risks and have the least adaptive capacity. This could prevent them from using damaging coping mechanisms and help them to build assets and resilience through the development of more climate-resistant livelihoods, livelihood diversification or weather-indexed crop insurance.[41] Properly designed and implemented employment guarantee schemes could be another way in which to build the resilience of vulnerable persons in the face of climate change.[42] Social protection programmes must be among the pillars of the climate change action plans that are increasingly being formulated by Governments.

41. While it is positive that the importance of sustainable development is reflected in the Millennium Development Goals, it is regrettable that they fail to include a specific goal or target related to climate change. This is despite the fact that those living in extreme poverty are affected the most by, yet have contributed the least to, the phenomenon. In addition, Goal 7 (ensure environmental sustainability) is criticized for not appropriately representing the realities of developing countries.[43] For instance, many low- and middle-income countries argue that they cannot afford to focus on renewable energy sources, such as solar and wind power, and instead need to use natural resources to achieve the Millennium Development Goals.[44] While this is a complex issue, the "pollute first, clean up later"[45] approach is clearly not a viable option. For most low-income countries, Goal 7 is not necessarily about cutting emissions, but rather about enabling those in poverty to "manage, control and sustainably develop natural resources".[46] In this regard, social protection programmes can play a considerable role.

42. While climate change simultaneously poses massive challenges for human rights and the prospects of those living in extreme poverty, the international and domestic actions required in the context of climate change represent an unparalleled opportunity to overcome poverty, generate new levels of development, further the realization of human rights and build a more stable, balanced and robust global

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[40] M. Davies, K. Oswald, T. Mitchell and T. Tanner, *Climate Change Adaptation, Disaster Risk Reduction and Social Protection* (Institute of Development Studies, 2008).

[41] Institute of Development Studies, *Connecting Social Protection and Climate Change Adaptation* (2007).

[42] Davies, Oswald, Mitchell and Tanner, *Climate Change Adaptation, Disaster Risk Reduction and Social Protection*.

[43] Overseas Development Institute, *Achieving the MDGs: The Fundamentals* (September 2008).

[44] E. Solheim, "Climate, Conflict and Capital", in *Poverty in Focus*, No. 19, 2010 (International Policy Centre for Inclusive Growth Poverty Practice, Bureau for Development Policy, UNDP).

[45] F. Urban, *The MDGs and Beyond: Can Low Carbon Development be Pro-Poor?* (Institute of Development Studies, *IDS Bulletin*, vol. 41, No. 1, 2010), p. 98.

[46] Office of the United Nations High Commissioner for Human Rights, *Claiming the Millennium Development Goals: A Human Rights Approach* (United Nations publication, Sales No. E.08.XIV.6), p. 38.

economy. States — particularly the industrialized countries that emit high levels of greenhouse gasses — must provide substantial funding, separate from and additional to pre-existing official development assistance (ODA) commitments, to help developing countries adapt to the inevitable effects of a warming climate.

F. Developing a global partnership for development (Goal 8)

43. Several developing countries face human, technical and financial constraints in establishing robust social protection systems. They require funds in order to first establish and then scale up such programmes. In this sense, social protection provides an excellent opportunity to forge stronger global partnerships. As addressed in previous reports, legally binding obligations and political commitments such as those set out in the Millennium Declaration and the Millennium Development Goals highlight the shared international responsibility for poverty reduction. International support for social protection measures becomes even more relevant in the context of the global economic crisis and its severe impact on the least developed countries. Unfortunately, the international community is failing to meet its ODA commitments, with negative consequences for the expansion of social protection systems around the world.

44. One of the most positive initiatives aimed at strengthening global partnerships in the context of social protection is the Social Protection Floor Initiative, launched in 2009 by the United Nations System Chief Executives Board for Coordination. Identifying a number of basic human rights obligations as focal points, the Initiative helps mobilize resources and expertise to assist countries in filling critical gaps in protection. The Initiative could be understood as the minimum set of policies upon which States can build higher standards of protection once national budget capacities have increased. It could be strengthened through the greater incorporation of human rights and the broadening of its scope to all relevant actors at the country level, including civil society organizations and the private sector.

IV. Gender inequalities and the implementation of social protection systems

45. As argued in the present report, social protection can play a crucial role in facilitating the achievement of the Millennium Development Goals. However, this cannot be accomplished without a strong emphasis on gender equality.

46. In view of the effect of gender dynamics on the realization of all the Millennium Development Goals, organizations have suggested that investing in women should be the first strategy for achieving the Goals.[47] The independent expert believes that at the current stage, the achievement of the Goals greatly depends on the strengthening of women's enjoyment of the full range of their human rights, including gender equality and women's empowerment.

47. Rights-based social protection systems can support progress towards the achievement of the Millennium Development Goals by, inter alia, promoting

[47] UNDP, *UNDP's MDG Breakthrough Strategy: Accelerate and Sustain MDG Progress* (2010), p. 9.

women's participation in economic activities, increasing their participation in the workforce, providing them with income security in old age and improving nutritional levels and food security, as well as girls' access to education. If women cannot, on an equal basis with men, benefit from development, participate in the labour market and participate in public decision-making, the achievement of the Goals will be seriously compromised.

48. In the sections below, the independent expert describes some of the key issues to be considered in ensuring that social protection policies properly address gender inequalities.

A. Gender inequality and vulnerability to poverty

49. Gender inequality causes and perpetuates poverty. Gender-based discrimination limits women's opportunities to gain access to education, decent work, land ownership, credit, inheritance and other economic resources, thus increasing their likelihood of living in extreme poverty.[48] Other factors, including age, ethnicity, race, disability and health status, compound the discrimination that women face and affect their living conditions. Accordingly, it is widely accepted that improving the situation of women is essential for sustainable development.[49] Eliminating extreme poverty in the long run, therefore, requires careful consideration of the various types of risks and the vulnerability to poverty experienced by men and boys and by women and girls.

50. Economic shocks affect women and men differently.[50] Owing to discrimination and gender inequality, women are disproportionately represented in the informal economy and thus have less access than men to many social insurance benefits, such as pensions and unemployment and sickness benefits. Even where women are employed in the formal labour market, discrimination often results in lower wages. Moreover, an interrupted work history as a result of care responsibilities, in particular child-rearing, and a longer life expectancy worldwide reduce the ability of women to contribute to social protection schemes and further disadvantage them in old age.

51. Women tend to work in sectors greatly affected by economic instability. During economic crises, they are thus often the first to lose their jobs. Furthermore, owing to lower levels of education, less control over productive resources and access to different supportive networks, they have weaker negotiating positions than men and fewer chances of finding other income-generating activities in which to engage.

52. The gender-specific effects of economic shocks are also apparent within households. When such shocks are confronted, gender bias within the household may lead to the allocation of fewer resources (such as food) to women or the selling of female-owned assets as an initial coping strategy. Moreover, during periods of crisis, women disproportionately suffer the impacts of public spending cuts on essential services and incur a heavier load of unpaid work than men.

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[48] UNDP, *Human Development Report 1995 — Gender and Human Development* (1995).

[49] Overseas Development Institute, *Gender and the MDGs* (2008).

[50] K. Ezemenari, N. Chaudhury and J. Owens, *Gender and Risk in the Design of Social Protection Interventions* (World Bank Institute, 2002), p. 2.

B. Social protection programmes and the contribution of women as caregivers

53. Gender concerns remain largely ignored, even when social protection schemes specifically target women within households or female-headed households.[51] The channelling of social protection to women may amplify the impacts of certain schemes reaching children or older persons, but it does not ensure that the root causes of gender inequality are adequately addressed. Evidence shows that social protection systems are rarely gender-neutral and that badly designed programmes can exacerbate or contribute to inequalities.[52]

54. The fact that structural discrimination against women prevails in most societies and the consequent limited influence of women in decision-making processes must be taken into account in all stages of programmes. Gender stereotypes frequently attribute to women the responsibility of caregiving, particularly for children and older persons. While such activities contribute significantly to household and community well-being and development, they often go unrecognized by States and societies. Domestic responsibilities are usually not remunerated, and they often prevent women from gaining access to the formal labour market and limit the opportunities for women and girls to participate in capacity-building activities, including education and training.

55. It is widely accepted that the provision of social protection benefits to women significantly improves the education, health and nutritional levels of children.[53] Understandably, this component has been incorporated into many social protection schemes around the world, with very positive consequences. However, the specific channelling of social protection towards women to increase the well-being of other household members must not undermine women's enjoyment of their human rights. The design of programmes should respect and acknowledge the role of women as care providers without reinforcing patterns of gender discrimination and negative stereotyping.

C. Developing gender-aware social protection initiatives

56. In order to ensure that men and women benefit equally from them, social protection systems must address women's life-cycle risks and the impediments to women's access to work and productive activities, as well as the burden of care.

57. In all types of programmes, it is crucial to ensure that gender-sensitive eligibility criteria are utilized. Some administrative requirements, such as the requirement that identification or birth registration documents be shown in order to qualify for a programme, may exclude women as they are less likely to possess an identity card or to have been registered at birth. Moreover, targeting methods can be dangerous if no attention is paid to local power structures. For example, having

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[51] R. Holmes and N. Jones, *Putting the Social Back into Social Protection: A Framework for Understanding the Linkages between Economic and Social Risks for Poverty Reduction* (Overseas Development Institute, 2009).

[52] M. Davies, *DFID Social Transfers Evaluation Summary Report* (Institute for Development Studies, 2009).

[53] R. Holmes, N. Jones and J. Espey, *Gender and the MDGs: A Gender Law Is Vital for Pro-Poor Results* (Overseas Development Institute, 2008).

community leaders determine who receives benefits (community targeting) can reinforce power structures, local gender norms and patron-client relations, often to the detriment of women, who are less able than men to influence decision-making processes. In some cases, community-targeted programmes have resulted in the further exclusion of already socially marginalized women.[54]

58. Social protection programmes must devote particular attention to intra-household dynamics and the inequalities and processes that create them. For example, qualifying conditions for benefits should move beyond the household and address how resources are distributed within it. The use of household targeting methods can put women at a disadvantage by ignoring the fact that women, in particular older women and girls, often receive fewer resources than men and boys, regardless of household income.

59. Social protection programmes must take into account and address all obstacles preventing women from gaining access to or participating in them. Childcare facilities, for example, appear to be effective in ensuring the participation of women in social protection programmes. Public-works programmes should allow for flexible working hours in order to accommodate domestic responsibilities. In addition, public-works activities could prioritize the promotion of gender-sensitive community assets (for example, facilitation of access to water, sanitation and firewood). In addition, policymakers could assess the feasibility of moving beyond employment-intensive social infrastructure projects to include some activities that might attract women while lessening their burden of unpaid work, such as child or elderly care. In any case, public work programmes must always ensure there are equal wages for men and women.

60. Conditional cash transfer programmes, in which women are expected to take full responsibility for meeting the conditions attached to programme participation (such as ensuring that children attend school and undergo compulsory medical check-ups) can be of particular concern. By imposing such responsibilities only on women, programmes may perpetuate gender stereotypes, limit women's ability to work and further undermine their well-being. Additional demands on their time may limit women's ability to seek health care (particularly if health-care centres are not easily accessible and childcare is unavailable) or further deprive them of leisure time. In some situations, such requirements can place a woman at risk of violence or abuse within the household for not having ensured compliance and thus having lost the benefit. They can also create scope for abuse by the relevant authorities, such as teaching personnel or health service providers.

61. In designing social protection programmes, policymakers must determine whether delivering benefits directly to women could lead to intra-household disputes and increase gender-based violence. Moreover, programmes must ensure that the social services offered are accessible, available and of good quality.

62. In addition, States must determine whether the way in which a programme channels the transfer causes or perpetuates the unequal distribution of labour between the genders within the household. For example, a programme that increases the amount of time that a mother spends away from home may have a detrimental effect on girls' schooling if girls are then required to carry out the activities usually performed by the mother, such as cooking or collecting water.

[54] Davies, *DFID Social Transfers Evaluation Summary Report*.

63. Gender inequality and discrimination patterns greatly affect the equal opportunities of women and men to seek, share and receive information about social protection programmes, participate in decision-making processes and register complaints that can result in local authorities being held accountable. The designing and implementation of participatory channels without taking into account gender relations within the community may reinforce women's dependency on men. For example, women may be present at a community meeting, but gender roles may prevent them from expressing their concerns, especially if male members of the community are present.

64. Social protection programmes must include accountability mechanisms that are accessible to both men and women. Their design must thus take into account the gender dynamics within the community and the household that may prevent women from voicing or lodging a complaint. Such mechanisms must also take account of the realities of gender-based violence and sexual harassment. Women, for example, might be reluctant to participate in programmes or claim rights and entitlements for fear of violence or abuse from male community members[55] or sexual harassment from a male programme implementer. Monitoring and evaluation mechanisms must also incorporate sex-disaggregated indicators to assess and improve their ability to take into account women's voices.

65. In order to ensure that women's rights are fully respected, social protection programmes must be accompanied by gender-sensitive social services, including sexual and reproductive health care. This requires investment in public services, without which social protection programmes will not be effective. Women and girls, for example, may be prevented from meeting conditionalities imposed by a programme if social services are far away and transportation costs are too high, or if they fear being sexually assaulted while making the trip required. Girls may not attend school if there are no separate sanitation facilities for them or if they are harassed by teachers or other students. Mothers may not bring their children to the hospital owing to discriminatory practices on the part of health-care providers (for example, requesting the consent of the husband) or communication difficulties (for example, women might be expected to demonstrate some form of literacy or might not be able to communicate in their minority language). In the same vein, women may choose not to use clinics for child delivery because of a lack of skilled birth attendants or culturally appropriate birthing methods.

66. Women rely on social services more than men owing to their reproductive and caregiving roles. Thus, if social services remain indifferent to the specific needs and vulnerabilities of women, and if economic barriers such as service fees for health and education remain in place, the potential benefits of social protection will be undermined.

V. A human rights approach to social protection for the achievement of the Millennium Development Goals

67. The present report stresses the fact that a rights-based approach to social protection programmes will maximize their potential for ensuring the achievement of the Millennium Development Goals. This section contains recommendations

[55] Holmes and Jones, *Putting the Social Buck into Social Protection*.

concerning how to frame the discourse on social protection and the Goals in human rights terms. Social protection interventions based on human rights can ensure that underlying obstacles cutting across all Millennium Development Goals are tackled. As the core of a rights-based social protection system, special attention to the various impacts of poverty on men and women must be provided by policymakers during the design, implementation, monitoring and evaluation of programmes.

A. Recognizing State obligations to provide social protection and ensuring an adequate legal and institutional framework

68. The establishment of a solid legal and institutional framework for social protection measures at the national level is a fundamental first step towards the realization of human rights as well as the achievement of the Millennium Development Goals. Enshrining social protection within domestic law affirms the duty of States to protect and promote the right to social security and an adequate standard of living. It solidifies States' long-term commitment to poverty reduction, placing social protection firmly on the political agenda. The independent expert has repeatedly emphasized the significance of legal and institutional frameworks in ensuring the long-term success of social protection programmes.[56]

69. The explicit inclusion of human rights norms, such as the right to social security, in domestic legislation places social protection within a framework of legally binding and enforceable rights and obligations. For example, various State constitutions unambiguously provide for the right to social security. Under such a framework, beneficiaries of social protection become "rights-holders" who can make claims against the State. Similarly, States and development partners become "duty-bearers", responsible for allocating resources to social protection in a manner that reflects human rights principles.

70. Legal and institutional frameworks also clarify the various roles and responsibilities of all stakeholders (Governments, development agencies and civil society organizations, as well as beneficiaries). This is an essential requirement for accountability. It also guarantees the involvement of State authorities throughout the development of social protection programmes. Clear and effective legal and institutional frameworks also significantly reduce the risk that political changes will jeopardize existing social protection programmes, which in turn protects beneficiaries from potential violations of their right to social security.

B. Adopting comprehensive, coherent and coordinated policies

71. The interdependence and the mutually reinforcing nature of human rights demand that States approach social protection holistically. They require that States establish a network of policies and programmes that collectively support the realization of all rights and the highest possible level of development. For example, if States are concerned exclusively with achieving Millennium Development Goal 2, they might opt for policies that will increase the overall number of children in school, but fail to ensure equal access to education. Conversely, if a State recognizes that the objective is not simply to achieve Goal 2, but also to provide for the right of

[56] See A/HRC/14/31.

everyone, without discrimination of any kind, to a high-quality education — which, in the longer term, will do more to help overcome poverty — policymakers will need to examine how social protection could better assist in meeting Millennium Development Goal targets in a manner that addresses issues of social inequality and vulnerability.

72. Similarly, while social protection interventions such as cash transfers free up financial resources that families can use to improve their health, such gains risk becoming meaningless in the absence of measures to guarantee universal enjoyment of the right to health, such as ensuring the adequacy of health-care infrastructure. The positive interaction among social protection, human rights and the Millennium Development Goals is strongest when it forms part of a supporting network of social policies (for example, quality standards for teachers and health-care professionals, infrastructure development and public awareness campaigns related to health and education).

C. Respecting the principles of equality and non-discrimination

73. States have the duty to protect persons against risks and vulnerabilities in an equal and non-discriminatory manner. Human rights obligations go beyond eliminating discrimination in law, policy and practice, and require States to take special measures to protect the most vulnerable segments of society as a matter of priority, while taking measures to progressively ensure universal protection. In this regard, the human rights approach is fundamental in channelling policies related to the Millennium Development Goals towards those who are most vulnerable and suffer most from direct and indirect forms of discrimination. Such channelling is an element missing from the Millennium Development Goal agenda.

74. Ensuring respect for these principles implies a preference for schemes that are universal. While targeting mechanisms may be seen as a way in which to reach those in extreme poverty, States must remain focused on the ultimate goal. While policies should prioritize the most vulnerable and disadvantaged, in accordance with human rights standards, they must also form part of longer-term strategies to progressively ensure universal coverage.

75. Accepting these principles entails both carefully screening policy choices to prevent the unfair exclusion of disadvantaged and disempowered groups — in particular, persons with disabilities, older persons, indigenous peoples, minorities and persons with HIV/AIDS — and actively seeking out ways to ensure that they are reached. In this regard, social protection programmes must be physically and culturally accessible. This means, for example, that benefits must be distributed within a safe physical distance and that transportation or opportunity costs must be taken into account. Outreach and information regarding programmes must be specifically designed to reach groups that are particularly vulnerable or excluded; examples include radio announcements and community plays aimed at overcoming illiteracy. Information about programmes must be available in the languages of minorities, indigenous peoples and immigrant populations.

76. Accessibility also requires that policymakers assess and take into account any possible discriminatory impact of the manner in which grants or transfers are disbursed. For example, owing to limited mobility (such as that of persons with disabilities and older persons), lack of familiarity with electronic methods of

payment (such as through the use of debit cards and mobile phones) and the gender impact (such as when queues are guarded by armed personnel), modes of disbursement could have unintended discriminatory effects.

77. Furthermore, registration processes can exacerbate social inequalities. What may appear to be a standard requirement can lead to the exclusion of linguistic minorities or persons with disabilities. Administrative barriers that inadvertently discriminate against those living in extreme poverty — for example, by requiring expensive identification documents, or requiring birth registration documents in areas where many people are not registered at birth — should be removed.

78. In practical terms, States must devise strategies to overcome context-specific cultural and geographical barriers. For instance, some States provide boarding facilities at some primary and secondary schools to encourage children living in remote areas or belonging to nomadic groups to attend school.[57] Likewise, States should develop more specific and disaggregated development indicators so as to tailor their social programmes more precisely and equitably to the needs of particular communities and groups.

D. Establishing gender-aware social protection

79. In addition to avoiding policies that exacerbate gender inequalities, social protection systems should actively promote gender equality and empower women. Policymakers must design, implement, monitor and evaluate social protection initiatives through a gender lens. Programmes should address asymmetries of power and structural inequalities, and enhance the realization of women's rights. They must take into account the multiple forms of discrimination that women experience, and ensure that women's specific needs are addressed throughout their lives: during adolescence, adulthood and old age.

80. The outcomes and impacts of social protection systems vary greatly; what has worked well in one context may work differently in another.[58] Given that social protection programmes are implemented in a variety of distinct social, economic, political and cultural contexts, each of which entails different gender roles and perspectives, it is impossible to provide a "one-size-fits-all" policy that will ensure a rights-based approach and gender awareness. However, a number of core gender-related dimensions can be identified.

81. Before designing and implementing a gender-aware social protection policy, States must conduct a comprehensive and disaggregated gender analysis that assesses the vulnerabilities of both genders as potential beneficiaries. The collection of disaggregated data, in terms of both sex and age, is essential not only for the design of effective social protection systems, but also for the unmasking of the gender dynamics that underpin — and often undermine — the achievement of the Millennium Development Goals.

82. Social protection programmes must be designed to address imbalances, risks and vulnerabilities, particularly with respect to gaining access to productive resources, education, health and work, as well as in terms of the reproductive and

[57] Questionnaire responses of Botswana and Greece (see footnote 2).

[58] Davies, *DFID Social Transfers Evaluation Summary Report*.

productive role of women. This requires adopting and supporting policies that address the specific gender-based obstacles preventing men and women from participating in social protection programmes on equal terms.

83. Social protection programmes must respect and acknowledge the role played by women as providers of care, without reinforcing patterns of discrimination and negative stereotyping. Measures must be taken to promote the value of care and to combine societal and State responsibilities for care work, encouraging men to participate more actively in supporting and caring for family members.

84. Programmes must be designed to mitigate gender-based power relations and address unequal decision-making powers and roles within both the household and the community. States should, for example, ensure the effective participation of women by establishing sex quotas in the governance structures of programmes. Programmes should take every opportunity to promote gender equality and mobilize women to organize themselves. For example, programme administrators should explore ways in which to make the best possible use of their regular interaction with communities to address prevailing gender inequalities, including identifying women's obstacles and addressing gender-based violence and early marriage. Where community meetings exist, they can be used to address women's time constraints and to mobilize women's groups.

85. Policymakers should invest in capacity-building to ensure that those implementing social programmes at both the national and the local levels are aware of gender issues. In addition, programmes should encourage capacity-building that empowers women to claim their rights. It is also critical that social protection programmes include built-in participation and accountability channels that are accessible to both women and men. Furthermore, gender indicators must be integrated into the monitoring and evaluation of social programmes.

86. The positive contribution of social protection to the achievement of the Millennium Development Goals depends in large part on access (both economic and physical) to culturally and gender-sensitive social services of good quality. This requires that policymakers understand and take into account the various challenges faced by women and men in seeking to gain access to social services.

87. Social protection is not a policy panacea and must be regarded as one element in a broad development strategy aimed at overcoming poverty and ensuring the enjoyment of human rights, including equality between men and women. It should be developed in coordination with other policies addressing the various factors causing or perpetuating gender inequality. In most countries, women's vulnerability to poverty would not change with social protection alone. Measures such as ensuring for women access to land, productive resources and credit; fair inheritance rights; full legal capacity; access to justice; and the removal of mobility restrictions are critical to effective development strategies. Moreover, the protection of women and girls from acts of violence against them, and the prevention and punishment of such acts, are essential for improving their standard of living. In this regard, national legislation must be in line with international human rights standards, in particular the Convention on the Elimination of All Forms of Discrimination against Women.

E. Guaranteeing participation, transparency and accountability

88. If they are to contribute to the transformative process envisioned in the context of human rights obligations, social protection programmes and policies must create space for effective and meaningful participation. From a human rights perspective, the effective participation of the beneficiaries is not only desirable in terms of ownership and sustainability, but is in itself a human right: the right to take part in public affairs.

89. This principle is supported by a number of specific human rights, including the right to freedom of expression and association. Participation must go beyond simple consultation. States should create an enabling environment for the effective participation of all vulnerable and disempowered groups, taking into account their constraints as well as asymmetries of power. Participation is also essential to ensure that interventions aimed at the achievement of the Millennium Development Goals are empowering and transformative, rather than the result of technocratic, top-down State policies. There are several programmes into which participatory mechanisms have been incorporated, with varying degrees of success. Brazil's "Bolsa Familia" programme, for example, requires municipal Governments to establish supervisory bodies composed of representatives of both local government and civil society, who jointly make decisions on how best to implement the programme within their community.[59]

90. In order to fulfil their human rights obligations States must guarantee transparency and access to information regarding social protection. They must implement programmes in a manner that enables individuals to easily recognize and understand eligibility criteria, the specific benefits that they will receive, and the redress mechanisms provided.

91. A human rights framework also demands accountability and redress mechanisms. Policymakers and others whose decisions and actions have a negative impact on the right to social security or the right to an adequate standard of living must be held accountable. Independent and effective judicial and quasi-judicial (such as human rights commissions and ombudspersons) mechanisms must be put in place to monitor the formulation and implementation of social policies. As has already been emphasized, in order to ensure that the more disadvantaged and disempowered can gain access to accountability mechanisms, such mechanisms must meet certain technical requirements, such as guaranteeing confidentiality, allowing for individual and collective complaints, being sufficiently resourced, being independent from political interference, and being culturally appropriate and gender-sensitive.

92. Measures to improve participation, transparency and accountability must be culturally, physically and economically accessible to all, without discrimination of any kind. The absence of effective and meaningful participatory channels and accountability mechanisms makes social protection programmes less likely to be understood in terms of entitlements and rights and more likely to be viewed as instruments of clientelism that can be manipulated by political actors.

93. Gaining access to judicial and administrative remedies can be costly and time-consuming, and may not adequately address systemic deficiencies within a

[59] Questionnaire response of Brazil (see footnote 2).

particular programme. Therefore, accountability mechanisms must be accompanied by measures to ensure access for those living in poverty, such as the provision of legal aid. In addition, States must allow for broader political accountability. This entails guaranteeing civil and political rights such as freedom of assembly and expression, and ensuring space for civil society activism and petitioning of the Government.

F. Strengthening international assistance and cooperation

94. The Millennium Declaration and the Millennium Development Goals highlight the shared international responsibility for poverty reduction and the need for a partnership among developed and developing countries against extreme poverty. Numerous legally binding human rights obligations refer to international assistance and cooperation.[60] Additionally, States must ensure that their international assistance and domestic development policies are designed and implemented in ways consistent with their human rights obligations, and further the realization of human rights in the recipient countries.

95. The international community can play a key role in supporting the establishment and scale-up of social protection systems. A number of core common principles can guide donors on how best to ensure and support the long-term sustainability of social security systems in recipient States. The statements of Governments reaffirming their commitment to human rights, gender equality and social protection must be translated into the increased allocation of resources to social protection systems that take into account gender equality.

96. Donor States must ensure coordination, predictability and a long-term perspective in the provision of assistance. Ensuring sustainability requires the strengthening of the recipient State's capability to eventually implement the programme unassisted. This includes a broad range of measures that can be supported by donor States, such as providing technical support to local and national authorities, building civil society's capacity to monitor the social protection system and hold the Government accountable, and assisting in strengthening the capacity to mobilize domestic resources (such as through more effective tax systems).

VI. Conclusions

97. **The fact that social protection initiatives worldwide are contributing to the achievement of all Millennium Development Goals is well known and widely accepted. Social protection, in particular social assistance, has the potential to improve the living conditions of those living in extreme poverty and to facilitate their enjoyment of various human rights, in particular the right to an adequate standard of living and to social security.**

[60] See articles 55 and 56 of the Charter of the United Nations, articles 2(1) and 11 of the International Covenant on Economic, Social and Cultural Rights, article 4 of the Convention on the Rights of the Child and article 32 of the Convention on the Rights of Persons with Disabilities, which impose legally binding obligations with regard to international assistance and cooperation.

98. **It is widely recognized that social protection interventions do not work in isolation; they must be developed within a broader policy framework, integrating various protective initiatives and ensuring access to essential social services and a favourable economic environment. The present report provides concrete recommendations regarding the core elements of a rights-based social protection system. The adoption of a human rights approach to social protection not only responds to international obligations and commitments, but also improves the effectiveness of such strategies and aligns them with the holistic perspective required to tackle the various dimensions of poverty.**

99. **The Millennium Development Goal review process is an opportunity to build and expand social protection systems, translating statements of commitment to the elimination of extreme poverty into reality. Raising awareness of human rights and how individuals can claim them would further contribute to poverty reduction. Human rights, such as the right to social security, an adequate standard of living and decent working conditions, and equality between women and men, are enshrined in numerous international human rights treaties, under which States are obligated to take concrete measures.**

100. **The review process is also an important opportunity to strengthen the international environment supporting gender equality in a broad sense and women's own voice and agency. Improvements in gender equality achieved through social protection and other, more comprehensive measures are strongly linked to the eradication of extreme poverty and hunger (Millennium Development Goal 1). Calls for the achievement of Millennium Development Goals must be complemented by a renewed commitment to the existing gender-related framework within human rights law, such as the Convention on the Elimination of all Forms of Discrimination against Women. Over the next five years, in order to ensure compliance with the Goals as well as with the commitments after 2015, gender-specific issues should be made much more visible.**

101. **Poverty is not gender-neutral, and any approach to social protection that is aimed at achieving the Millennium Development Goals while respecting human rights must take account of the fact that women and men experience poverty differently. Numerous studies have shown a positive link between improvement in terms of women's access to health care, education and other social benefits, and economic growth, the reduction of income poverty and overall progress in achieving the Millennium Development Goals. Gender equality is a development objective to which gender-aware social protection can contribute.**

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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the report of the independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Cephas Lumina, submitted in accordance with Human Rights Council resolutions 7/4 and 14/4.

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Report of the independent expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights

Summary

The present report, submitted in accordance with Human Rights Council resolutions 7/4 and 14/4, explores the linkages between debt and trade. The report argues that coherence in trade and finance policymaking can provide better sustainable development outcomes and contribute to a durable solution to the debt problems of developing countries and the realization of human rights, particularly economic, social and cultural rights and the right to development in those countries.

The report is organized as follows. Section I provides an introduction to the report and outlines the activities undertaken by the independent expert since the submission of his previous report to the General Assembly (see A/64/289 and Corr.1) in 2009. Section II explores the linkages between trade and debt. It also briefly examines the impact of trade liberalization on debt relief and human rights, highlights some of the limitations of debt sustainability assessments under the joint International Monetary Fund/World Bank Debt Sustainability Framework and calls for a new debt sustainability framework incorporating sustainable development and human rights concerns. Section III underscores the need for policy coherence in the areas of trade and finance, including debt. Section IV offers some tentative conclusions and recommendations.

Contents

		Page
I.	Introduction	4
II.	The debt and trade nexus	5
	A. Trade, debt and human rights	5
	B. Conditionality and debt relief	5
	C. Trade liberalization as a condition for debt relief	9
	D. Impact of trade liberalization on debt and human rights	10
	E. Debt sustainability: definition, analysis and criticisms	12
	F. Debt sustainability: the role of trade	13
	G. A human rights-based approach to debt sustainability	14
III.	The need for policy coherence	17
IV.	Conclusions and recommendations	18

I. Introduction

1. In its resolution 7/4, the Human Rights Council requested the independent expert to "explore further, in his/her analytical annual report to the Human Rights Council, the interlinkages with trade and other issues, including HIV/AIDS, when examining the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights" (para. 4). In its resolution 14/4, the Council requested the independent expert to continue to explore those connections "when examining the impact of structural adjustment and foreign debt" (para. 27). The Council further requested the independent expert to submit analytical reports on the implementation of these resolutions to the Council and progress reports thereon to the General Assembly (resolution 7/4, para. 9, and resolution 14/4, para. 33) and to report to the General Assembly on the issue of the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights (resolution 14/4, para. 30). In accordance with those requests, the present report explores the nexus between debt and trade.

2. Since the submission of his previous report to the General Assembly (see A/64/289 and Corr.1) in 2009, the independent expert has undertaken a range of activities. These are described in his reports to the Council (A/HRC/14/21 and Add.1). In addition, in June 2010, the independent expert presented his annual report to the Council at its fourteenth session. On 17 and 18 June 2010, the independent expert conducted the first of a series of regional consultations on the draft general guidelines on foreign debt and human rights,[1] as requested by the Council in its resolution 11/5 and decision 12/119. Other regional consultations are scheduled as follows: Africa (October 2010), Asia-Pacific (November 2010) and Europe/Other (February 2011). A final session to consolidate the various regional perspectives will be held in Geneva in March/April 2011. The purpose of the consultations is to seek the views of various stakeholders, including States, international organizations, regional organizations, international financial institutions, civil society organizations and academia, on the form and content of the guidelines with a view to improving them.

3. The Latin America and Caribbean regional consultation was organized by the Office of the United Nations High Commissioner for Human Rights (OHCHR) in collaboration with the Economic Commission for Latin America and the Caribbean (ECLAC) in Santiago. The independent expert would like to thank ECLAC and OHCHR for their interest in and support for the consultations.

4. From 28 June to 2 July 2010, the independent expert participated in the seventeenth annual meeting of the special procedures mandate-holders, organized by OHCHR in Geneva.

[1] The guidelines, which are voluntary in character, are designed to ensure that the obligations of States arising from debt and other related international financial obligations do not impair their capacity to fulfil their human rights obligations. The guidelines (in their current form) are available from the website of the independent expert, at http://www2.ohchr.org/english/issues/development/debt/index.htm.

II. The debt and trade nexus

A. Trade, debt and human rights

5. Trade and debt are inextricably connected: the benefits derived from trade have an impact on the external debt position of countries.[2] The revenue generated by exports allows countries to address external debt burdens. Since debts must ultimately be paid by exports, any decline in export prices raises the real value of debt. Thus, it has been observed that "the growth of exports is most critical for sustaining external debt".[3]

6. The debt crisis has its origins in reckless lending and over-borrowing by developing countries against their future earnings from trade.[4] Commodity-dependent countries — especially those dependent on one major commodity, such as copper, coffee or cocoa — were the most severely affected by the debt crisis.[5] There is a link between the continued deterioration of the debt of low-income countries and their dependence on export commodities. In addition, an unsustainable debt burden also reduces the capacity of countries to attract investment and, therefore, to generate economic growth and enhance trading prospects.

7. There is also a relationship between debt and human rights. As the independent expert observed, the diversion by heavily indebted developing countries of resources from public-services expenditure to debt servicing constitutes an obstacle to sustainable development and the realization of human rights.

B. Conditionality and debt relief

8. Conditionality — the linking of aid to the implementation of macroeconomic policy conditions by the recipient country — has been a dominant, albeit contentious, feature of the International Monetary Fund (IMF) and World Bank programmes for more than two decades.[6] Common conditions have included privatization of utilities such as water and electricity; cuts in public expenditure (often at the expense of funding basic social services, including those designed to benefit the poor); redundancies in the civil service (the major employer in many countries); the introduction of user fees for basic social services such as basic education and primary health care; and trade liberalization through the removal of subsidies and import tariffs.

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[2] See submission by Argentina on the relationship between trade, debt and finance to the World Trade Organization Working Group on Trade, Debt and Finance (WT/WGTDF/W/33), 12 September 2005.

[3] See Aldo Caliari (ed.), *Debt and Trade: Making Linkages for the Promotion of Development* (Geneva, South Centre/Centre of Concern, 2009), p. 101.

[4] Ibid., p. 113.

[5] In the period between the commencement of the crisis in 1980 and 1985, agricultural commodity prices decreased by a quarter while the interest these countries had to pay escalated sharply.

[6] See EURODAD, *Untying the knots: how the World Bank is failing to deliver real change on conditionality* (November 2007) available from www.eurodad.org; Peter Hardstaff, *Treacherous conditions: how IMF and World Bank policies tied to debt are undermining development* (London, World Development Movement, May 2008), p 5; International Monetary Fund (IMF), *Trade Policy Conditionality in Fund-Supported Programmes* (Washington, D.C., IMF, 2001).

9. In the 1980s and 1990s, many developing countries that were severely affected by the debt crisis turned to IMF and the World Bank for loans, which came with strict conditions attached regarding fiscal adjustment and the implementation of market-oriented policy reforms (structural adjustment programmes).[7] Based on what has been described as "a misplaced confidence in the power of the financial markets to self-regulate", structural adjustment programmes often entailed trade liberalization and deregulation of capital account liberalization.[8] The recent financial crisis and the resulting global recession have shattered that myth.

10. While IMF and the World Bank claim to have revised their approach to conditionality, including by reducing the number of conditions attached to their finance, studies indicate that little has changed in their conditionality practice.[9] For example, a 2007 study conducted by the European Network on Debt and Development (EURODAD) on the basis of World Bank data found that the Bank attached an average of 37 conditions per loan (13 of which were considered legally binding).[10] Some countries, however, faced a much higher number of conditions. For example, under its Poverty Reduction Support Grant of 2006, Rwanda faced 144 conditions.[11] In a study that assessed 216 programmes approved by IMF during the period from 1995 to 2004, the IMF Independent Evaluation Office found that the Fund had increased both the number of structural conditions and their intrusiveness in the policymaking process of recipient countries.[12] In April 2008, EURODAD reported that "since the conditionality guidelines were approved, IMF has not managed to decrease the number of structural conditions attached" to its development lending and that "the Fund continues to make heavy use of highly

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[7] See Melik Ozden, *Debt and human rights: consequences for human rights of the debt of the countries of the South and the current state of its treatment within the United Nations bodies* (Geneva, CETIM, 2008) pp. 3 and 4.

[8] *World Economic and Social Survey 2010: Retooling Global Development* (United Nations publication, Sales No. E.10.II.C1), p. 104.

[9] In 2002, the International Monetary Fund approved a set of guidelines ("the Conditionality Guidelines") which committed the Fund to reduce the overall number of conditions to inform its use of structural conditionality. Similarly, in 2005, the World Bank undertook a review of its conditionality practice and subsequently adopted five "Good Practice Principles" that were intended to reduce the overall number of conditions attached to Bank lending and ensure that those attached respected and were drawn from poverty reduction plans devised by the recipient country. Nevertheless, the Bank continues to attach sensitive economic policy conditions such as privatization and liberalization conditions to its lending. See EURODAD, *Untying the knots*, pp. 8-14. See also EURODAD, *World Bank and IMF conditionality: a development injustice* (2006); Benedicte Bull, Alf Morten Jerve and Erlend Sigvaldsen, *The World Bank's and the IMF's use of conditionality to encourage privatization and liberalization: current issues and practices*, report prepared for the Norwegian Ministry of Foreign Affairs as background for the Oslo Conditionality Conference, SUM Report No. 13 (Oslo, Centre for Development and the Environment, University of Oslo, 2006).

[10] EURODAD, *Untying the knots*, p. 9.

[11] Ibid.

[12] IMF Independent Evaluation Office, "An IEO evaluation of structural conditionality in IMF-supported programmes", 27 November 2007, available at http://www.ieo-imf.org/eval. IMF attaches two different types of policy conditions to its loans for poor countries: quantitative conditions and structural conditions. Quantitative conditions impose a set of macroeconomic targets on poor-country Governments determining matters such as the level of fiscal deficit a Government is allowed to go into or the level of domestic credit allowed. Structural conditions require the implementation of institutional and legislative policy reforms. They include elements such as trade reform, price liberalization and privatization.

sensitive conditions, such as privatization and liberalization".[13] According to EURODAD, the "vast majority" of the Poverty Reduction and Growth Facilities approved between 2005 and 2008 had liberalization or privatization conditions.[14]

11. Policy conditions, including privatization and liberalization of the trade and financial sectors, continue to be attached to loans and debt relief mechanisms by IMF and the World Bank.

12. Under the Heavily Indebted Poor Countries (HIPC) Initiative, countries that qualify for debt relief must meet specified conditions at the decision point and the completion point.[15] In order to reach the decision point, countries must establish a track record of macroeconomic stability and must have a national poverty reduction plan (poverty reduction strategy paper). This requirement is not limited to heavily indebted poor countries but extends to all countries receiving concessional loans from the International Development Association (IDA). The poverty reduction strategy paper links debt relief and poverty reduction: it consists of a report by the debtor country on the macroeconomic and social policies and programmes to be implemented under its strategy for growth and poverty reduction. It also outlines the requirements for and sources of external funding. The poverty reduction strategy paper is approved by the World Bank and IMF.

13. Poverty reduction strategy papers typically require the privatization of public utilities (sometimes called "public sector reform"),[16] deregulation, removal of subsidies (including those that benefit the poor), the promotion of exports and foreign investment and trade liberalization. According to IMF, "sustained pro-poor economic growth, based on robust private sector activity and investment, will be the keystone of the poverty reduction strategy. The Fund will continue to advise on and

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[13] Nuria Molina and Javier Pereira, *Critical conditions: the IMF maintains its grip on low-income Governments* (EURODAD, April 2008), pp. 4 and 5. The study was based on an assessment of poverty reduction and growth facilities approved by IMF between January 2003 and December 2007 for 35 countries across different regions. Poverty reduction and growth facilities are loans that IMF gives to low-income countries based on the recipient country's poverty reduction strategy paper.

[14] Molina and Pereira, *Critical conditions*, pp. 4 and 5.

[15] The Heavily Indebted Poor Countries (HIPC) Initiative was launched by the World Bank and IMF in 1996 to reduce the debt burdens of heavily indebted poor countries that had committed to implementing reforms designed to encourage sustainable economic growth, macroeconomic stability and poverty reduction. It was enhanced in 1999 in order to provide more substantial debt relief. To qualify for debt relief under the HIPC Initiative an eligible country must (a) have debt burden indicators above the HIPC Initiative thresholds using the most recent data for the year immediately prior to the decision point; (b) have established a satisfactory track record of policy performance under respective IMF- and International Development Association-supported programmes; (c) have in place a poverty reduction strategy. In June 2005, the HIPC Initiative was supplemented by the Multilateral Debt Relief Initiative (MDRI), which was designed to provide additional debt relief and thereby accelerate progress towards the Millennium Development Goals. MDRI ostensibly allows 100 per cent relief on eligible debts owed to IMF, the International Development Association of the World Bank and the African Development Fund for countries completing the HIPC Initiative. The Inter-American Development Bank joined MDRI in March 2007 and decided to provide similar debt relief to the five HIPC countries in Latin America and the Caribbean. See IMF, *Factsheet: Debt Relief under the Heavily Indebted Poor Countries (HIPC) Initiative*, 18 February 2010.

[16] According to EURODAD, conditions classified by the World Bank as "public sector reform" are often conditions enabling the legal and policy environment for privatization. See EURODAD, *Untying the knots*, p. 13.

support policies to this end, including prudent macroeconomic management, free and more open markets, and a stable and predictable environment for private sector activity ... since donors will have their own perspectives on priorities and funding possibilities, they need to be closely involved in the participatory process".[17] In effect, therefore, poverty reduction strategy papers are the same as the much-maligned structural adjustment programmes.

14. In order to reach the completion point, a country must maintain macroeconomic stability, undertake structural reforms and implement a poverty reduction strategy to the satisfaction of IMF and the World Bank.

15. The poverty reduction strategy paper process has been criticized in relation to questions of participation by civil society and ownership by countries. It has been asserted that, in a number of countries, there has been a lack of effective civil society participation in the formulation of poverty reduction plans and inadequate consideration of alternative policies.[18] It also has been asserted that it is fallacious to speak of country ownership of poverty reduction strategy papers, since they are subject to approval by the boards of IMF and the World Bank. It has been contended further that, even if the papers omit mention of policies such as privatization and liberalization, IMF and the World Bank can still impose those policies through the Poverty Reduction and Growth Facility and Poverty Reduction Support Credits, respectively.[19]

16. The adverse impact of structural adjustment policies (and high debt burdens) on the provision of basic, human-rights-related social services, as well as their contribution to the increasing poverty and marginalization of the poor in the developing countries that were constrained to implement them, is well documented.[20]

17. Conditionality is ineffective[21] and undermines country ownership, as well as national policy space and the ability of Governments to regulate for the benefit of vulnerable groups and in favour of their development agendas. By taking policy decisions away from sovereign Governments and placing them in the hands of unelected donor officials, conditionality undermines the accountability of Governments to their citizens and goes against the accepted norms of good

[17] IMF, *The Poverty Reduction and Growth Facility (PRGF): Operational Issues* (Washington, D.C., IMF, 1999).

[18] See, e.g., T. Bierschenk, E. Thioleron and N. Bako-Arifari, "Benin", R. Jenkins and M. Tsoka, "Malawi", I. Dante, J. Gaultier, M. Marouani and M. Raffinot, "Mali", H. Falck, K. Landfald and P. Rebelo, "Mozambique", and A. Evans and E. Ngalwea, "Tanzania", *Development Policy Review*, vol. 21, No. 2 (2003).

[19] Hardstaff, *Treacherous conditions* (see footnote 6), p. 10.

[20] See, e.g., E/1990/5/Add.48, paras. 3 and 35; CEDAW/C/CMR/1; CRC/C/65/Add.18, para. 382; CRC/C/3/Add.62, paras. 121, 134 and 457; CRC/C/KEN/2, para. 30; E/C.12/KEN/1, paras. 6 and 90; CRC/C/70/Add.18, para. 67; E/C.12/BOL/2, paras. 2 and 372; CRC/C/65/Add.2, paras. 35, 36 and 124; E/1990/5/Add.40, paras. 6, 36 and 170; CEDAW/C/HON/6, para. 350; CRC/C/65/Add.28, para. 53; E/C.12/IND/5, para. 4; CRC/C/70/Add.17, paras. 128 and 144; CRC/C/65/Add.30, paras. 36 and 37; CEDAW/C/BRA/1-5; E/CN.4/2001/53; E/CN.4/2006/44; E/CN.4/2002/59; and E/CN.4/2001/52. See also Hardstaff, *Treacherous conditions*, p. 5.

[21] It is interesting to note that a 2007 assessment by the IMF Independent Evaluation Office indicates that conditionalities neither instigate sustainable policy changes nor assist countries in meeting the poverty reduction goals agreed with IMF, concluding that "conditionality should be limited to the core areas of IMF expertise" (IMF, Independent Evaluation Office, "An IEO Evaluation of structural conditionality in IMF-supported programmes", 27 November 2007).

governance, adherence to which the international financial institutions often require of developing countries. It also runs counter to the recognition in the Monterrey Consensus of the International Conference on Financing for Development[22] that "each country has primary responsibility for its own economic and social development, and the role of national policies and development strategies cannot be overemphasized" (para. 6). The Monterrey Consensus further emphasizes "the need for multilateral financial institutions, in providing policy advice and financial support, to work on the basis of sound, nationally owned paths of reform that take into account the needs of the poor and efforts to reduce poverty, and to pay due regard to the special needs and implementing capacities of developing countries and countries with economies in transition, aiming at economic growth and sustainable development" and that "advice should take into account social costs of adjustment programmes, which should be designed to minimize negative impact on the vulnerable segments of society" (para. 56).

18. It should be noted that, from a human rights perspective, regulation is a duty: human rights law requires States to take appropriate legislative, administrative, budgetary, judicial and other measures to fulfil human rights.[23]

C. Trade liberalization as a condition for debt relief

19. Not only do trade liberalization policy conditions continue to be attached to new loans, as stated above, but their implementation is also a key feature of debt relief. For example, one study of HIPC decision point documents for 26 countries found that all mentioned a previous privatization programme and an ongoing or future privatization process. A total of 15 specifically mentioned planned privatization in public utilities or basic services such as energy, telecommunications, water and transport; 23 referred to past efforts to liberalize trade and 11 indicated a continuing trade liberalization process.[24]

20. In coffee-producing countries, including Côte d'Ivoire, Ethiopia, Kenya and Uganda, the World Bank and IMF have advised and/or required Governments to liberalize the coffee sector.[25] Liberalization has included measures such as removing controls on supply and on prices, dismantling State-owned trading agencies and encouraging increased production and exports. In 1998, the eligibility of Côte d'Ivoire for HIPC debt relief was made conditional on the full liberalization

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[22] *Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002* (United Nations publication, Sales No. E.02.II.A.7), chap. I, resolution 1, annex.

[23] See, e.g., International Covenant on Economic, Social and Cultural Rights, art. 2 (1). Although certain trade rules, such as the General Agreement on Trade in Services (GATS), recognize the right of WTO members "to regulate and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives" and recognizes the particular need of developing countries to exercise that right, the practical invocation of the right is fraught with difficulty because many GATS obligations lack clarity. It is also notable that WTO members can regulate only to the extent that the regulations they adopt are not inconsistent with their WTO obligations. See Caroline Dommen, "The WTO, international trade and human rights", in Michael Windfuhr (ed.), *Mainstreaming Human Rights in Multilateral Institutions* (2004), available at http://www.3dthree.org/pdf_3D/WTOmainstreamingHR.pdf.

[24] Hardstaff, *Treacherous conditions* (see footnote 6), p. 7.

[25] Ibid., p. 13.

of the coffee sector by the 1998/99 crop year.[26] A second national agricultural services support project funded by the World Bank emphasized the requirement to fully liberalize the coffee sector.[27]

21. That policy advice/conditionality did not seem to take into account the implications of the IMF and the World Bank's encouraging increased production and exports in other parts of the world. Between 1998 and 2001, oversupply in the markets caused a price collapse and a crisis in coffee-producing countries.[28] This situation may lead to a reduction in the debt relief that countries eventually receive.

D. Impact of trade liberalization on debt and human rights

22. Trade liberalization may have a positive impact on the debt-servicing capacity of economies, as it may result in increased sources of foreign exchanges such as net exports and foreign direct investment.[29] But this is not always the case. For example, when a country is heavily dependent on the export of primary commodities, progressive trade liberalization requires the reduction or elimination of import and export tariffs, and the resulting fiscal gap may then have to be filled with increased borrowing, thus increasing a country's debt burden.

23. It is often assumed that there is a positive correlation between trade liberalization and economic development in low-income countries. However, liberalization has not produced the expected increase in growth rates or improved international integration for many low-income countries. In fact, trade liberalization can actually be a barrier to development in countries with outstanding external debt obligations and may violate the human right to development. As one recent report has noted, trade liberalization has "progressively restricted the space available to developing countries for utilizing trade policies to foster economic development".[30]

24. Apart from failing to deliver the expected economic growth and development in many heavily indebted poor countries, trade liberalization has had a negative impact on the realization of human rights, particularly economic, social and cultural rights and the right to development in those countries. Indeed, the continued imposition of policy conditions such as trade liberalization and privatization on the provision of concessional loans or debt relief is inconsistent with the historical evidence regarding the success of such policies. In 2002, the United Nations Conference on Trade and Development reported that the rapid and extensive trade liberalization undertaken by the least developed countries during the 1990s failed to benefit the poor and, in fact, led to increased unemployment, increased wage inequality and increased poverty.[31]

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[26] World Bank, Côte d'Ivoire decision point document, 6 March 1998.

[27] World Bank, second national agricultural services support project, project appraisal document, 23 June 1998.

[28] World Bank, "Ethiopia: developing exports to promote growth", sector report, 25 April 2002.

[29] Impact of trade liberalization on external debt burden: econometric evidence from Pakistan (http://mpra.ub.uni-muenchen.de/9548/1/MPRA_paper_9548.pdf)

[30] Ibid.

[31] United Nations Conference on Trade and Development (UNCTAD), *Least Developed Countries Report 2002: Escaping the Poverty Trap* (Geneva, UNCTAD, 2002); UNCTAD, *Economic Development in Africa — From Adjustment to Poverty Reduction: What's New?* (Geneva, UNCTAD, 2002).

25. In the United Republic of Tanzania, debt cancellation was made conditional on the privatization of water supplies in Dar es Salaam. This resulted in severely reduced access to water for the poorest, both through cuts in services and through increased fees.[32] In Malawi, the liberalization of the agricultural sector through the reduction of subsidies for small-scale farmers, the removal of price controls and the restructuring/privatization of the national agricultural marketing agency resulted in price increases, the increased hoarding of grain and lack of affordable food for the poor, thereby undermining food security for the majority of the population.[33]

26. The imposition of conditions on developing countries requiring the removal of agricultural subsidies points to a lack of consistency in global economic governance. Developed countries provide huge subsidies to their agricultural sectors, thereby giving their farmers an unfair advantage in terms of the cost of production by allowing them to charge a lower price for products that compete with unsubsidized agricultural products from developing countries.[34] This market distortion occurs primarily in such commodities as cotton, rice, vegetables and other agricultural products, on which many poor developing countries depend. By limiting production and income opportunities for farmers in developing countries, agricultural subsidies in developed countries threaten the livelihoods of local producers and therefore their right to an adequate standard of living.[35]

27. The available evidence indicates that trade liberalization often has particularly adverse effects on women. This constitutes a violation of the principle of non-discrimination. The High Commissioner for Human Rights has observed that non-discrimination in the context of trade entails not only protecting individuals and groups against overt discrimination but also ensuring that certain individuals and groups are not left out of the trade picture.[36]

28. In many cases, the trade liberalization policies imposed on developing countries since the mid-1980s have had disastrous consequences for those countries. As one non-governmental organization has observed, the policies have left a legacy of poverty and unemployment.[37] In short, trade liberalization has run counter to the World Trade Organization goals of "raising standards of living" and safeguarding "sustainable development".[38]

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[32] See Jubilee Debt Campaign, *Debt and Women*, briefing note, 2007.

[33] K. Owusu and F. Ng'ambi, *Structural damage: the causes and consequences of Malawi's food crisis* (London, World Development Movement, 2002), available at http://www.wdm.org.uk/campaign/resource.htm#reports.

[34] Since 2001, the European Union, the United States, Japan and Canada have collectively spent more than $750 billion on agricultural subsidies. See *The DATA Report 2008*, pp. 66 and 67.

[35] See Office of the United Nations High Commissioner for Human Rights, "Human rights and trade", paper prepared for the fifth WTO Ministerial Conference held in Cancun, Mexico, in September 2003, available from www2.ohchr.org; *World Economic and Social Survey 2010* (see footnote 8), p xvi; World Commission on the Social Dimension of Globalization, *A Fair Globalization: Creating Opportunities for All* (International Labour Organization, 2004), paras. 374 and 375.

[36] See E/CN.4/Sub.2/2003/9.

[37] War on Want, *Trading Away Our Jobs: How free trade threatens employment around the world* (March 2009) (available from www.waronwant.org), p. 5.

[38] See Marrakesh Agreement Establishing the World Trade Organization, annex 1A, 33 I.L.M. 1153 (1994).

29. Finally, it is important to note that the notion that the perceived positive effects of trade liberalization would compensate for its negative impacts with regard to those categories, by leading to net welfare gains that should benefit all categories following redistributive policies, does not correspond to a human rights perspective, which focuses on the most vulnerable. That has not always proved to be correct empirically, and it often results in an overestimation of the capacity of States in the developing world to manage such a redistribution of gains.[39]

E. Debt sustainability: definition, analysis and criticisms

30. "Debt sustainability" is often defined as the ability of a country to discharge its debt service obligations without requiring debt relief or accumulating arrears.[40]

31. In April 2005, IMF and the World Bank introduced a joint Debt Sustainability Framework for low-income countries "to guide the borrowing decisions of low-income countries in a way that matches their financing needs with their current and prospective repayment ability, taking into account each country's circumstances".[41] The Debt Sustainability Framework is also designed to guide "creditors' lending and grant-allocation decisions to ensure that resources are provided to low-income countries on terms that are consistent with both progress towards their development goals and long-term debt sustainability".[42] Debt sustainability assessments are used to determine access to IMF financing and to determine the share of grants and loans in the World Bank's assistance to each low-income country.

32. Under the Framework, the World Bank and IMF conduct debt sustainability assessments consisting of an analysis of a country's projected debt burden over a 20-year period and its vulnerability to external and policy shocks; an assessment of the risk of debt distress during that time, based on indicative debt burden thresholds that depend on the quality of the country's policies and institutions; and recommendations for a borrowing and lending strategy that limits the risk of debt distress. The risk of debt distress is rated on the basis of four categories: (a) low risk, when all the debt indicators are well below the thresholds; (b) moderate risk, when debt burden indicators are below the thresholds in the baseline scenario, but stress tests indicate that thresholds could be breached if there are external shocks or abrupt changes in macroeconomic policies; (c) high risk, when the baseline scenario indicates a protracted breach of debt or debt service thresholds but the country does not currently face any repayment difficulties and alternative scenarios or stress tests also show protected threshold breaches; or (d) in debt distress, when the country is already facing repayment difficulties.

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[39] A/HRC/10/5/Add.2 (2009).

[40] For a detailed discussion of debt sustainability, see EURODAD, *To Repay or to Develop? Handbook on Debt Sustainability* (April 2006).

[41] International Monetary Fund, *Factsheet: The Joint World Bank-IMF Debt Sustainability Framework for Low-Income Countries*, March 2010, available at http://imf.org/dsa.

[42] In 2006, the International Monetary and Financial Committee of the Board of Governors of IMF stated that "the debt sustainability framework … is the primary tool to be used by borrowers and creditors in … developing coherent lending practices, and urges all creditors and borrowers to use the framework in their lending and borrowing decisions". See communiqué of the

33. The IMF and World Bank concept of debt sustainability has been severely criticized by many debt relief campaigners because it appears to be limited to the capacity of a country to service its debts in terms of export earnings and, to a lesser extent, Government revenue, without due regard to other demands on those resources. In addition, the ratios fail to take into consideration political and institutional characteristics that affect debt repayment capacity. In other words, debt sustainability assessments under the Debt Sustainability Framework focus almost exclusively on the ability of the debtor countries to repay their debts. They do not take into account a country's ability to provide basic services, such as food, safe water, shelter, education and health. Thus, IMF/World Bank debt sustainability assessments ignore the primary human rights obligation of States to provide for the basic social needs of their people. Consequently, it has been suggested that debt sustainability should include "an assessment of the level of revenue that a Government can realistically be expected to raise without increasing severe poverty or compromising future development".[43]

F. Debt sustainability: the role of trade

34. Heavily indebted poor countries face significant challenges in integrating into world trade owing to a lack of access to private capital markets, debt overhang and deterioration in the terms of trade.[44] An assessment of HIPC completion point countries' private current transfers and export of services reveals their continued reliance on commodity exports and vulnerability to terms of trade shocks.[45] Their export structures remain weak. Commodities make up most of their exports, while exports of manufactured goods are limited. In addition, exports in a number of completion point countries have been dominated consistently by just one or two commodities. Their narrow export bases have left these countries particularly vulnerable to terms-of-trade shocks. In particular, countries with narrow export bases tend to be more vulnerable to external shocks.[46]

35. Export projections by IMF and the World Bank under their debt sustainability assessments have been found to be overly optimistic in many cases. In other words, the projected debt-export ratio is overstated, with the result that exports may be lower than projected. According to one commentator, the fact that "the margin of prediction error is even greater for countries working under the Fund's supervision suggests that monetary, fiscal and exchange rate policies promoted by the IMF are not creating an economic environment that is capable of generating the kind of stable and sustainable debt ratios assumed in its projects".[47] Such over-optimistic

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[43] New Economics Foundation, *Debt relief as if justice mattered* (London, New Economics Foundation, 2008) p. 11.

[44] Marc Auboin, *The Trade, Debt and Finance Nexus: At the Cross-roads of Micro- and Macroeconomics*, WTO Discussion Paper, available at http://www.wto.org/english/res_e/booksp_e/discussion_papers6_e.pdf.

[45] Ibid.

[46] Yan Sun, *External Debt Sustainability in HIPC Completion Point Countries*, IMF Working Paper No. WP/04/160 (September 2004), available at http://ssrn.com/abstract=878985.

[47] Yilmaz Akyüz, *Debt Sustainability in Emerging Markets: A Critical Appraisal*, Department of Economic and Social Affairs Working Paper No. 61 (ST/ESA/2007/DWP/61), November 2007,

assumptions about economic growth are rooted in "unrealistic projections for private investments and exports".[48]

36. The misplaced assumptions underlying IMF sustainability assessments are confirmed by the Fund's own Independent Evaluation Office, which has stated that "there is evidence that investment is consistently overestimated in IMF-supported programmes".[49]

37. According to a study of 16 post-HIPC countries conducted by the Brooks World Poverty Institute, on average, the net present value of external debt service relative to average exports for these countries, assuming the provision of relief in 2004 under the Multilateral Debt Relief Initiative, is expected to increase from an initial ratio of 22 per cent in 2004 to 176 per cent in 2015, rising to a peak of 242 per cent in 2026.[50] The study concludes that the growth of exports is critical for the maintenance of sustainable debt levels in post-HIPC countries.[51]

38. As the independent expert noted in his report to the Human Rights Council (A/HRC/11/10, para. 84), the fact that a number of HIPC countries have seen their debt levels rise after obtaining HIPC debt relief owing to the fall in prices of their exports (particularly in the context of the recent global recession) demonstrates the link between the terms of trade and debt accumulation. It is therefore critical that debt sustainability analyses at the completion point of the HIPC Initiative take into consideration "any worsening global growth prospects and declining terms of trade" as emphasized in the Monterrey Consensus (para. 49).

G. A human rights-based approach to debt sustainability[52]

39. It is clear that the IMF/World Bank concept of debt sustainability is very narrow and does little to advance the poverty reduction goals of debt relief. For this reason, there have been calls at various levels for a revision of the concept in a manner designed to ensure the attainment of sustainable human development and the realization of human rights.[53]

40. As a starting point, it should be noted that the Monterrey Consensus called for "future reviews of debt sustainability" to "also bear in mind the impact of debt relief on progress towards the achievement of the development goals contained in the Millennium Declaration" and emphasized that "the computational procedures and

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[48] Ibid.

[49] IMF, Independent Evaluation Office, *Fiscal Adjustment in IMF-Supported Programmes* (Washington, D.C., IMF, 2003), p. 4.

[50] Jacinta Nwachukwu, "The Prospects for Foreign Debt Sustainability in Post-Completion Point Countries: Implications of the HIPC-MDRI Framework", Brooks World Poverty Institute Working Paper No. 26 (Manchester, Brooks World Poverty Institute, University of Manchester, February 2008), p. 12.

[51] Ibid., p. 19.

[52] For a discussion of the human rights-based approach to development cooperation, see Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-based Approach to Development Cooperation* (New York and Geneva, United Nations, 2006).

[53] In 2006, the World Bank abandoned its review of the concept of sustainability because the operation "would be costly to donors". See International Development Association, *Review of Low-Income Country Debt Sustainability and Implications for the Multilateral Debt Relief Initiative (MDRI)* (Washington, D.C., World Bank, 2006).

assumptions underlying debt sustainability analysis need to be kept under review" (para. 49).

41. In his report entitled "In larger freedom: towards development, security and human rights for all" (A/59/2005), the Secretary-General proposed that "we should redefine debt sustainability as the level of debt that allows a country to achieve the Millennium Development Goals and reach 2015 without an increase in debt ratios" (para. 54).

42. Many non-governmental organizations and several intergovernmental organizations advocate a human development approach to debt sustainability, according to which debt should be repaid only from residual resources after the Government has met its priority spending, including on internationally agreed development goals. For example, EURODAD considers that debt sustainability should be redefined as the level of debt that allows countries to meet the Millennium Development Goals by 2015 without increasing debt ratios.[54]

43. A human development approach to debt sustainability requires that not only debt sustainability assessments, but also policy responses to the debt problem, give primacy to human development priorities.[55] Thus, a human development approach calls for human development needs to be placed not only at the centre of debt sustainability, but also at the centre of the design and implementation of all international economic policies. It also entails ensuring that those affected by debt are able to participate in its management.

44. The independent expert supports those proposals to redefine the concept of debt sustainability in a manner that takes account of human development imperatives. However, he considers that debt sustainability analyses should include an assessment of the level of debt that a Government can carry without undermining its capacity to fulfil its human rights obligations (see A/64/289 and Corr.1). A human rights-based approach offers specific value, which places emphasis on the principles of participation, accountability, transparency and non-discrimination and the universality, interdependence and indivisibility of all human rights. It should also be noted that there are close links between the Millennium Development Goals and human rights. In addition, human rights are relevant to achieving more sustainable, equitable development outcomes.

45. A rights-based approach linking debt and trade would ensure that resources from both debt relief and enhanced trade are first applied to the fulfilment of human rights. In this regard, it is important to recall that the Universal Declaration of Human Rights states that everyone has the right to a standard of living adequate for the health and well being of himself and his family, including food, clothing, housing and medical care and necessary social services (art. 25) and that everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized (art. 28).

46. In the view of the independent expert, that taking human rights into consideration during debt sustainability analyses is consistent with the broadly

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[54] EURODAD. See also CIDSE, *The New World Bank/IMF Debt Sustainability Framework — A Human Development Assessment* (April 2006).

[55] Aldo Caliari, *The Debt Sustainability Framework: How the Bretton Woods Institutions managed to subvert the human development grounds for debt relief*, available at http://www.newscentre.bham.ac.uk/debtrelief/Birmingham_Full_Paper_2_pdf.

accepted principle that international organizations have obligations under international law, including those arising under the Charter of the United Nations and human rights treaties.[56] For example, in 2003, the internal ombudsman of the International Finance Corporation called on the Corporation to "systematically consider risks to human rights at the project level, take appropriate steps to mitigate them, and provide clearer guidance to clients on both of these aspects".[57] In 2006, the General Counsel of the World Bank stated that the Bank's Articles of Agreement "permit, and in some cases require, the Bank to recognize the human rights dimensions of its development policies and activities".[58] Thus, with specific reference to IMF and the World Bank, any argument that their articles of agreement preclude consideration of human rights or that they have no obligations to respect human rights must now be considered untenable.

47. It is also well established that States must adhere to their international law obligations when they act through international organizations. For example, in *Waite and Kennedy v. Germany*, the European Court of Human Rights held that "where States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organizations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution".[59] Similarly, in paragraph 19 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, it is stressed that "the obligations of States to protect economic, social and cultural rights

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[56] See, e.g., A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford, Oxford University Press, 2006) pp. 137-159; C. Lumina, "An assessment of the human rights obligations of the World Bank and the International Monetary Fund with particular reference to the World Bank's Inspection Panel", *Journal for Juridical Science*, vol. 31, No. 2 (2006), pp. 108-129; August Reinisch, "The Changing International Legal Framework for Dealing with Non-State Actors", in P. Alston (ed.) *Non-State Actors and Human Rights* (Oxford, Oxford University Press, 2005); M. Darrow, *Between Light and Shadow: the World Bank, the International Monetary Fund and International Human Rights Law* (Oxford, Hart Publishing, 2003); S. Skogly, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (London, Cavendish, 2001); P. Sands and P. Klein, *Bowett's Law of international Institutions*, fifth edition (London, Sweet and Maxwell, 2001), pp. 458-459; Thomas Buergenthal, "The World Bank and Human Rights", in E. Brown Weiss, A. Rigo Sureda and L. Boisson de Chazournes (eds.), *The World Bank, International Financial Institutions and the Development of International Law* (Washington, D.C., American Society of International Law, 1999); Daniel D. Bradlow, "The World Bank, the IMF and Human Rights", *Transnational Law and Contemporary Problems*, vol. 6, No. 1 (Spring 1996).

[57] See World Bank, *Extracting sustainable advantage? a review of how sustainability issues have been dealt with in recent IFC and MIGA extractive industries projects*, Final Report, Compliance Advisor Ombudsman (Washington, D.C., World Bank, April 2003), p. 36.

[58] See World Bank, "Legal Opinion on the Human Rights and the Work of the World Bank", Roberto Dañino, Senior Vice-President and General Counsel, 27 January 2006, para. 25.

[59] European Court of Human Rights Application No. 26083/94, Grand Chamber judgement of 18 February 1999, para. 67. See also *Matthews v. United Kingdom*, Application No. 24833/94, Grand Chamber judgement of 18 February 1999, para. 32; Willem van Genugten, "Tilburg Guiding Principles on World Bank, IMF and Human Rights", in Willem van Genugten, Paul Hunt and Susan Matthews (eds.), *World Bank, IMF and Human Rights* (2003), pp. 247-255 and A/CN.4/564/Add.2.

extend also to their participation in international organizations, where they act collectively".

48. Finally, an important aspect of the duty of international cooperation as reflected in the Charter of the United Nations and binding international human rights treaties is that States parties, individually or through membership of international institutions, should not adopt policies or engage in practices that imperil the enjoyment of human rights. Consequently, loan or debt relief conditionalities should not impair the capacity of States to deliver and provide access to basic public services.

III. The need for policy coherence

49. Trade, debt and finance policies are important components of the development strategy of any country. Coherence between them, therefore, is essential in domestic and international economic policies in order to adequately support national development policies. The pursuit of these areas in isolation raises the risk that policy actions in one area will undermine rather than support the goals of policy actions in another.

50. The need for coherence among trade, financial and monetary policies has been recognized in a number of international decisions, including the United Nations Millennium Declaration, the São Paulo Consensus, adopted at the eleventh session of the United Nations Conference on Trade and Development,[60] the Monterrey Consensus of the International Conference on Financing for Development[61] and the 2005 World Summit Outcome.[62]

51. More recently, the United Nations has emphasized that trade, development and finance should be treated in an integrated and coherent manner in order to create and sustain an enabling environment for maximizing development gains for all countries. As stated by the Under-Secretary-General for Economic and Social Affairs in the preface to the *World Economic and Social Survey 2010*, "there is a need to strengthen the global coordination of economic decision-making so as to minimize the number of cases where rules dealing with trade, aid, debt, finance, migration, environmental sustainability and other development issues come into conflict".[63]

52. It is also notable that the founding documents of the World Trade Organization (WTO) enshrine a declaration to cooperate with IMF and the World Bank in order to

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[60] Para. 17 of the São Paulo Consensus reads: "In order to enable developing countries to reap greater benefits from globalization and to achieve the international development goals, including those contained in the Millennium Declaration, there is a need to enhance the coherence and consistency of the international monetary, financial and trading systems" (see TD/412, part II).

[61] Para. 52 of the Monterrey Consensus reads: "In order to complement national development efforts, we recognize the urgent need to enhance coherence, governance and consistency of the international monetary, financial and trading systems." Para. 4 indicates a commitment to "enhancing the coherence and consistency of the international monetary, financial and trading systems" (see *Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002* (United Nations publication, Sales No. E.02.II.A.7), chap. I, resolution 1, annex).

[62] See resolution 60/1.

[63] *World Economic and Social Survey 2010* (see footnote 8) p. xxiv.

achieve "greater coherence in global economic policymaking", while mutually respecting the mandates and independence of each institution.[64] That commitment is reflected in the agreements between WTO and IMF and the World Bank, which recognize the linkages between the various aspects of economic policymaking that fall within the respective mandates of those institutions and oblige them to "consult with each other with a view to achieving greater coherence in global economic policymaking".[65] In practice, however, such cooperation appears to be limited to the granting of observer status to the senior managers of each institution at the ministerial meetings of the other institutions — something that can hardly be characterized as "a mechanism to reach coherence among international trade and financial policies".[66] It is therefore important that an international mechanism for achieving such policy coherence be created.

53. It is also important to ensure that global economic policymaking is consistent with the realization of human rights, particularly economic, social and cultural rights and the right to development. It has been observed that the preamble to the WTO Agreement elaborates the purposes of the organization "in terms that are broadly consistent with the human ends that underlie the rights in the International Covenant on Economic, Social and Cultural Rights".[67]

IV. Conclusions and recommendations

54. **According to the Millennium Development Goal Gap Task Force Report 2008, a significant number of countries that benefited from debt relief have seen their debt vulnerability indicators deteriorate, in part because they still face significant development financing challenges. Of the heavily indebted poor countries, 21 (including 14 at the post-completion point) are considered to be at moderate-to-high risk of falling back into debt distress; 10 (mostly those at the pre-completion point) are currently considered to be in debt distress.[68] The report concludes that the Millennium Development Goal target of dealing comprehensively with the debt problems of developing countries has not been achieved in full.[69]**

55. **Market-oriented development strategies advocated by the (now largely discredited) Washington Consensus and being imposed on developing countries**

[64] See the Declaration on the Contribution of the World Trade Organization to Achieving Greater Coherence in Global Economic Policymaking, which forms part of the Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994.

[65] Agreement between the International Monetary Fund and the World Trade Organization, WT/L/195, annex I, para. 2, and Agreement between the International Bank for Reconstruction and Development, the International Development Association and the World Trade Organization, WT/L/195, annex II, para. II. See also World Trade Organization, Agreements between the WTO and the IMF and the World Bank, Decision adopted by the General Council at its meeting on 7, 8 and 13 November 1996, WT/L/194, 18 November 1996.

[66] Caliari, *Debt and Trade* (see footnote 3) p. 8.

[67] Robert Howse and Ruti G. Teitel, *Beyond the Divide: the Covenant on Economic, Social and Cultural Rights and the World Trade Organization*, Occasional Paper No. 30 (Geneva, Friedrich-Ebert Foundation, April 2007).

[68] *Millennium Development Goal 8: Delivering on the Global Partnership for Achieving the Millennium Development Goals*, Millennium Development Goal Gap Task Force Report 2008 (United Nations Publication, Sales No. E.08.I.17) p. x.

[69] Ibid., p.33.

by the international financial institutions are not helping those countries to achieve sustainable people-centred development and are contrary to the earlier policies that promoted modern development in Western Europe and Japan. Those development policies involved, inter alia, agrarian reforms, investments in human capital, selective trade protection, directed credit and other Government support for developing industrial and technological capacity while exposing firms gradually to global competition.[70]

56. **The reduction of poverty in developing countries requires not only debt relief and development assistance, but also changes to global trade rules so as to afford developing countries improved trade opportunities to fuel development and growth. In particular, impediments to enhanced access, in the form of trade distortions such as trade restrictions and agricultural subsidies, should be removed.**

57. **The right to development requires an enabling national and international environment that, inter alia, affords Governments some policy space to implement national development policies that are responsive to the needs of their people. Consequently, debt relief schemes should ensure that indebted countries retain "policy space" for implementing strategies to improve their productive structure to make the move into exports of more dynamic products with higher skill and technology content; ensure that greater value is added to exports; diversify the economy and nurture infant industries; and provide adequate levels of financing, in affordable terms, to the indigenous productive sector.**

58. **The Debt Sustainability Framework should prioritize achieving national development goals and human rights, rather than improving debt repayment. This would be consistent with the professed aims of the multilateral debt relief initiatives geared towards the achievement of the Millennium Development Goals. In addition, debt sustainability analyses should balance government revenues against a country's needs to finance its nationally designed and nationally owned development plans and to fulfil its human rights obligations. Financing needs to achieve the Millennium Development Goals and broader human development needs, including human rights, should be given priority in debt sustainability assessments.**

59. **A key limitation of the joint IMF/World Bank Debt Sustainability Framework is that it is creditor-managed and therefore arguably lacks objectivity. The debt sustainability assessments undertaken in the context of the framework are conducted by IMF and the World Bank, both of which are creditors. This calls into question whether the assessments are really objective. Debt sustainability assessments should be transparent, accountable and independent. That can be assured only through a process that balances the interests of creditors and debtors in accordance with the principle of shared responsibility for preventing and resolving unsustainable debt burdens. There is therefore a need for debt sustainability assessments to be made by an independent panel of experts appointed by both creditors and debtors. In this regard, the independent expert urges Member States to urgently consider the establishment of an independent debt workout mechanism under the auspices**

[70] See *World Economic and Social Survey 2010* (see footnote 8).

of the United Nations.[71] An impartial and independent sovereign debt restructuring mechanism that mediates effectively and fairly between debtors and creditors is an indispensable component of a stable international financial system.[72]

60. **Furthermore, in order to address debt sustainability at a systemic level, it is necessary for the international community to adopt a binding legal framework on responsible lending and borrowing elaborating legally recognized standards for responsible financing. Such a framework should be monitored by an impartial and transparent arbitration panel under the auspices of the United Nations.**

61. **National development strategies need to be supported by stable aid flows; by a fair multilateral trading regime that allows countries space for building domestic production capacity and pursuing sustainable development goals; and by stable and predictable financial markets.[73] This will require profound reforms of the existing international aid, trade and financial architectures and efforts to ensure policy coherence across those areas.**

62. **Urgent consideration should be given to the establishment of an international agency (under the auspices of United Nations) to systemically address issues of coherence and consistency in multilateral rule-setting.**

63. **It is important that the international financial institutions respect the commonly accepted norms of good governance that they demand of the countries that they lend to, including transparency, accountability, fairness and ownership. In this regard, it is important to recall that in the Monterrey Consensus the international community made a commitment to "good governance at all levels".[74]**

64. **The independent expert considers that the provision of debt relief and new loans should not be made conditional on privatization, investment deregulation and trade liberalization, all of which have proved ineffective as well as harmful to heavily indebted poor countries, as they are inconsistent with accepted norms of governance, including ownership and participation. Nevertheless, he supports the attachment of conditions designed to ensure effective citizen participation in poverty reduction strategy papers processes and to ensure transparency and accountability in the use and management of loans or funds freed up by debt relief.**

65. **The independent expert shares the view of the Millennium Development Goal Gap Task Force that, in order to improve market access for developing countries, it is necessary to prioritize trade and its links to development and poverty reduction in national development strategies; to reduce substantially the tariffs imposed by developed countries on agricultural products, textiles**

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[71] See *Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002* (United Nations publication, Sales No. E.02.II.A.7), chap. I, resolution 1, annex, para. 60.

[72] *World Economic and Social Survey 2010* (see footnote 8) p. 143.

[73] Ibid., p. xii.

[74] See *Report of the International Conference on Financing for Development, Monterrey, Mexico, 18-22 March 2002* (United Nations publication, Sales No. E.02.II.A.7) chap. I, resolution 1, annex) para. 4.

and clothing from developing countries; and to accelerate the reduction of trade-distorting domestic and export subsidies in developed countries.[75]

[75] Millennium Development Goal Task Force Report 2008 (see footnote 69) pp. 17-21.

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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights

Corrigendum

Footnote 30 of the report of the independent expert *should read*

[30] *World Economic and Social Survey 2010: Retooling Global Development* (United Nations publication, Sales No. E.10.II.C1), p. xvi.

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